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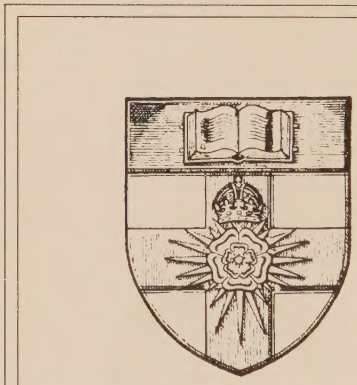

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THE IRISH REPORTS.

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

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CORRIGENDA.

Page 175, last two lines, *transpose* names of solicitors.

,, 468, margin, *insert* "April 24."

,, 608, line 8, *delete* name of Mr. Gordon, K.C., as counsel for the respondent; also *delete* "and".

NOTE.

THE HOUSE OF LORDS have reversed the judgment of the COURT OF APPEAL and have restored that of the KING'S BENCH DIVISION in *Cooke* v. *Midland Great Western Railway of Ireland Co.* ([1908] 2 I. R. 242, 270).

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1908.

THE KING (ANNE COYLE) *v.* THE JUSTICES OF COUNTY MONAGHAN (1).

K. B. Div.
1906.
April 19, 20.

Justices—Order authorizing road contractor to enter lands—Route to enter prescribed—Limit of time—Orchard—"Orcharding out" contractor—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.

Justices, in making an order under section 162 of the Grand Jury Act, 1836, authorizing a road contractor to enter upon lands to raise stones, have no jurisdiction to prescribe a route by which the contractor must enter, and an order containing a provision to that effect is bad.

An order authorizing a road contractor to enter upon lands is not bad merely because the right of entry is given during a period of several years.

Semble, per Lord O'Brien, L.C.J.: there is no jurisdiction to make an order to enter on lands which are in fact an orchard, even though the owner may have turned them into an orchard for the purpose of ousting the jurisdiction of the Justices.

(1) Before Lord O'Brien, L.C.J., and Andrews and Kenny, JJ.

K. B. Div. 1906.

THE KING (COYLE) *v.* JUSTICES OF MONAGHAN.

CERTIORARI.

The prosecutrix was served with a summons at the suit of one John Hurson, applying for an order to enter on prosecutrix's farm of land in Brandrum, in the County of Monaghan, and to dig for, raise, and carry away from a quarry on the said farm, stones for the repair of portion of a public road, for the repair of which Hurson was the County Council contractor.

The summons came on for hearing at Monaghan Petty Sessions; and an order was made by the magistrates which, after reciting that a presentment had been made by the County Council of Monaghan to keep in repair the portion of the road in question for four years, viz., from the 1st April, 1905, to 31st March, 1909, that John Hurson was the County Council contractor for the execution of the work, and that it had been proved that stones wanted for the repair of the said road during the said period could not be conveniently procured elsewhere than in a certain quarry, part of the lands in the occupation of the prosecutrix, which land was not a deer park, bleach green, orchard, walled garden, haggard or yard, or planted walk, lawn, or avenue to a mansion house, proceeded as follows: "Now, we the undersigned justices of the peace, in pursuance and exercise of the power and authority in that behalf given to us by the 162nd section of the said Act 6 & 7 Wm. 4, c. 116, and 61 & 62 Vict. c. 37, sect. 12, sub-sect. 2, do hereby authorize the said John Hurson, during the said period specified in the said presentment should he so long continue County Council contractor as aforesaid, or for such portion of said period as he shall so long continue, to enter, as such contractor, with his assistants, into the said quarry, part of the lands of Brandrum, now in the occupation of Anne Coyle, hereinbefore mentioned, for the purpose of digging for, raising, and carrying away, in and out of same, stones wanted for the repair of the said road during said period, so as aforesaid specified, or for such portion thereof as he may continue to be County Council contractor as aforesaid, under the said presentment. The said John Hurson and his assistants, in going to or from the same quarry, whether with or without carts or vehicles, shall go and come by the route indicated in red ink on the sketch-map on back hereof, and shall not use any other way." On the back of the order was

a sketch indicating by a red line the route referred to in this order.

The prosecutrix obtained a conditional order for a writ of *certiorari* to bring up and quash the order on the grounds (*inter alia*) (*a*) That there was no evidence before the magistrates that the alleged quarry mentioned in the order was not part of an orchard; (*b*) that it was proved before the magistrates that the alleged quarry, at the date of the order, was part of an orchard; (*c*) that the magistrates had no jurisdiction to prescribe by their order the route by which Hurson and his assistants should go to or from the alleged quarry mentioned in the order; (*d*) that the time limited by the order, to wit up to the 31st March, 1909, within which Hurson was authorized to enter upon the lands was excessive and unreasonable, and illegal, and that it was not legally competent for the magistrates to determine that the stones sought by the order could not be conveniently procured elsewhere for the said period.

The affidavit of the prosecutrix contained (paragraph 6) the following statements as to the evidence given at the hearing before the magistrates on the question of whether the alleged quarry was an orchard or not:—

"It was proved at the said hearing that I had bought my said farm of land for the sum of £191 in the month of November, 1905, and that when I bought said farm, the field from which the said John Hurson wants to get the stone was an old orchard which had been with the rest of the farm allowed to go to the bad, but the remains of the fruit trees and two old apple trees were there, and are now growing thereon. . . . It was also proved that in the month of November, 1905, prior to my being served with said summons, I had planted said field from which said John Hurson wants to get stones, with apple and pear trees."

Hurson in his affidavit, filed by way of cause against making the conditional order absolute, deposed:—"I myself, my said son, and John Hall, the predecessor of Anne Coyle, the prosecutrix, in the tenancy of her said holding, all swore that the said quarry was not an orchard, or any of the excepted lands mentioned in sect. 162 of the Grand Jury Act of 1836; and I say that the evidence given on behalf of the said Anne Coyle was to the effect that

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efforts were made to turn the said quarry into an orchard after she had bought the said holding, and that her son admitted on cross-examination that, while it was not his sole object, in planting the alleged orchard, it was one of his objects, that I might thereby be excluded from taking stones therefrom. . . . It was proved before the magistrates that the real orchard runs round, and in close proximity to, the dwelling house of the said Anne Coyle, and is actually fenced in from the field in which the quarry lies, whereas, the quarry on which the two crab trees referred to in paragraph 6 of the said affidavit are was never an orchard, and was only planted in November last after I had a conversation with the prosecutrix as to my continuing to enter her lands and the terms on which I was to be allowed to do so. The said John Hall also swore that the said quarry was never an orchard."

The affidavit also stated that the route directed by the Justices was so directed by them for the benefit of the prosecutrix so that the deponent should be prevented from going through the orchard which ran round the house.

The present application was to make the conditional order absolute notwithstanding cause.

D. M. Wilson, for the prosecutrix :—

I submit that the order is bad on three grounds.

1. The jurisdiction of the Justices under sect. 162 of the Grand Jury Act, 1836, is to make an order to enter the land, there is no power to prescribe the route by which entry is to be made. The order here is in effect an order to enter by a particular route and no other. The portion of the order prescribing the route is not severable from the rest of the order: therefore the whole order is bad.

2. The period of time for which the right of entry is given is excessive. The order should be limited to the immediate necessity of the contractor with reference to the repair of the road: *Earl Manvers* v. *Bartholomew* (1). The provision in the section that the amount payable by way of satisfaction for any damage done by taking materials is to be assessed by three house-

(1) 4 Q. B. D. 5.

holders, who are to view the premises immediately previous to, and immediately after, such damage, shows that the Legislature did not contemplate a right of entry extending over several years, since some of the householders who had viewed the premises beforehand might have died before the expiration of the period. No doubt, in *The Queen* (*Murphy*) v. *The Justices of Wexford* (1), Lord O'Brien, L.C.J., and Holmes, L.J., thought that an order to enter during the continuance of a contract which had something over three years to run was good. But this was not necessary to the decision in the case. Madden, J., declined to express an opinion as to whether this was a reasonable limitation of time. [He also referred to *The Queen* (*Bentham*) v. *Justices of Co. Dublin* (2) and *The Queen* (*Guinness*) v. *Justices of Co. Louth* (3).]

3. The lands in question are an orchard. This is not a case like *R.* (*Holmes*) v. *The Justices of King's County* (4) where a few fruit trees were planted for the purpose of ousting the jurisdiction. Here the apple trees were planted long before any question arose.

Clancy (with him *Henry*, *K.C.*), for Hurson:—

Assuming that the portion of the order prescribing a route is bad, this part is severable from the rest of the order and may be struck out, leaving a perfectly good order to enter generally. Once the Justices are satisfied that the materials cannot be conveniently procured elsewhere, they are bound to make the order for entry. There is no power to impose any restriction on the right of entry by a prescribed route, and any such restriction is bad. This bad portion of the order is severable from the rest of the order and may be struck out, leaving a perfectly good order to enter generally. Where the line of demarcation between the good part of an order and the bad can be clearly pointed out, the order may be supported as to the good part: *The Queen* v. *Green* (5); *The Queen* v. *Inhabitants of Stoke Bliss* (6). Even assuming that the parts of the order are not severable, the

(1) [1894] 2 I. R. 81.
(2) 14 L. R. Ir. 44.
(3) [1898] 2 I. R. 248.
(4) 4 New Ir. Jur. 22.
(5) 20 L. J. (N.S.) M. C. 168.
(6) 6 Q. B. 158.

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Court should refuse *certiorari*, since on a subsequent application the Justices would be bound to make a general order to enter, so that the *certiorari* would be futile, and should not therefore be granted: *The Queen* (*Gilbey*) v. *Justices of Fermanagh* (1).

As to the limitation of time, in none of the cases has it ever been held that an order to enter was bad because it was to extend over several years.

There was evidence before the magistrates sufficient to justify them in holding that the place was not an orchard.

D. M. Wilson, in reply:—

In *The Queen* (*Gilbey*) v. *Justices of Fermanagh* (1) the writ applied for was a writ of mandamus. *Certiorari* is different. A person aggrieved by an illegal order is entitled to have it set aside unless he has by his conduct precluded himself from taking the objection: Short and Mellor, Crown Practice, p. 117. There is nothing in the present case to show that the prescribing of the route was at the instance of the prosecutrix.

April 20.

LORD O'BRIEN, L.C.J.:—

We have considered this case very carefully. It has been remarkably well argued both by Mr. Wilson and Mr. Clancy, who have given us every assistance. It appears that an order under sect. 162 of the Grand Jury Act, 6 & 7 Wm. 4, c. 116, was obtained by a road contractor named Hurson, authorizing him to enter a certain quarry, portion of lands in the occupation of the prosecutrix, for the purpose of raising and carrying away stones for the repair of a road. The order was in the following terms:—[His Lordship read the order.] It is said that this order is bad mainly on three grounds—1st, that it does not sufficiently limit the period of time during which the right of entry is to exist; 2nd, that it authorizes the taking of stones from an orchard; and 3rd, that it prescribes a route by which the contractor is to go to and from the quarry.

I am of opinion that the first ground relied on on behalf of the prosecutrix fails. I think that the order prescribes a limit, and prescribes it sufficiently. I adhere to the opinion which I expressed,

(1) [1897] 2 I. R. 559.

and in which Holmes, J., concurred, in *The Queen* v. *Justices of Wexford* (1).

With regard to the second point, I think there was evidence both ways as to the character of the *locus in quo*. I do not think it requisite in the particular case to state what my own opinion would be. I say no more than that there was evidence upon which the magistrates might act in finding that the place was an orchard; and although the evidence is not very full as to this, I think there was sufficient evidence to justify their finding.

With reference to this question of orchard or no orchard I wish to say a word. In *The King* (*Holmes*) v. *Justices of King's County* (2) we decided that it was possible for the magistrates to say the place was not an orchard. I asked during the argument in that case whether it was possible, to use the term I there employed, to "orchard out" a contractor. Subject to anything I may hear hereafter I am inclined to think this is possible, provided that a real orchard is made, and not a mere sham or semblance. It would appear to me that a man may use his own land in any way he pleases, and may therefore turn it into an orchard, and so "orchard out" a contractor.

The third point, viz., whether the magistrates were justified in prescribing a route, was very energetically argued on both sides. The section of the Act of Parliament authorizes the Justices to make an order for entry on the lands—for entry simply. What have they done here? After authorizing Hurson with his assistants to enter the quarry for the purpose of raising stones, the order proceeds to add: "The said John Hurson and his assistants in going to or from the said quarry, whether with or without carts or vehicles, shall go and come by the route indicated in red ink on the sketch-map on back hereof, and shall not use any other way." In my judgment that order is not, as Mr. Clancy contends, an order giving a general right of entry, with an undertaking by the contractor not to use any other way than that prescribed. I am of opinion that the clause I have read forms portion of the matter adjudicated upon. The order is an order for entry by one way, and one way only—an entry by a prescribed route. The Act

(1) [1894] 2 I. R. 81. (2) 4 New Ir. Jur. 22.

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of Parliament does not, in my judgment, authorize this. Reading the order then as a whole, as I think it must be read, it is bad on its face, because it is not authorized by the Act of Parliament.

No doubt where an order is severable, so that the part which is bad can be severed from the part which is good—where, as Erle, C.J., says, in *The Queen* v. *Green* (1), the line of demarcation can be clearly pointed out—in such case the bad part may be rejected and the good allowed to stand. But that is not the case here. Here there is a single adjudication. The magistrates never for a moment intended that Hurson should have a general right of entry.

With respect to costs, the prosecutrix made a number of points. Practically only three of these were argued, and of these all failed except the one I have last dealt with. Under the circumstances there will be no costs on either side. We will make the conditional order absolute, but without costs.

ANDREWS, J.:—

I concur on the ground that I think the prescribing of a route was outside the jurisdiction of the magistrates, and that the order was indivisible and therefore bad. I think that the other objections fail.

KENNY, J., concurred

Solicitor for the prosecutrix: *William Martin.*
Solicitor for John Hurson *Henry Murphy.*

J. G. T.

(1) 20 L. J. (N. S.) M. C. 168.

HANNAM, APPELLANT; MORRISSEY, RESPONDENT (1). *K. B. Div.* 1906. Nov. 2, 8.

Justices—Summary jurisdiction—Prosecution by constable under Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Service of summons—Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 12, *sub-s.* 2.

M. was charged on summons, on the complaint of a constable of the Royal Irish Constabulary, with an offence under sect. 6 of the Sale of Food and Drugs Act, 1875. The summons was served by another constable, by the direction of the Justice who issued it:—

Held, that the service was bad, inasmuch as a prosecution under the section in question, though a constable is the complainant, is not a case of an offence prosecuted by the constabulary within the meaning of sect. 12, sub-sect. 2, of the Petty Sessions (Ireland) Act, 1851, and the power given by such sub-section to the Justice issuing the summons to direct, in cases of offences other than those prosecuted by the constabulary, service by a person other than the summons-server of the district, does not authorize the Justice to direct service in such cases by a constable (2).

CASE STATED by Justices under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions of Ballymacarbery, County Waterford, the respondent was charged on a summons in which Acting Sergeant Thomas Hannam, Inspector of Foods and Drugs for the Petty Sessions District of Ballymacarbery, was complainant, with having sold to the complainant to his prejudice as a purchaser an article of food, viz., new milk, that was not of the nature and quality of the article demanded, contrary to the provisions of sect. 6 of the Sale of Food and Drugs Act, 1875.

Upon the case being called for hearing it appeared that the

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

(2) Petty Sessions (Ireland) Act, 1851, sect. 12, sub-sect. 2. "In cases of offences prosecuted by the constabulary, the summons shall be served by a head or other constable, but in all other cases it may be served by the summons-server of the district, or (if the Justice issuing the same shall so direct or permit) by any other person whom the complainant shall employ, and who shall be able to read and write, but in no case by the complainant himself."

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summons was served upon the respondent by Constable Timothy Gleeson, a member of the Royal Irish Constabulary, and that the summons was specially indorsed to him for service by the Justice who issued it. The respondent was present at the hearing, but took no part in the proceedings. The magistrates made an order as follows:—"The service of the summons in this case was by Timothy Gleeson, a member of the Royal Irish Constabulary; and the Court, holding that the offence charged is not an offence prosecuted by the constabulary, but by the complainant as an Inspector of Foods and Drugs, and that the said Constable Timothy Gleeson was not therefore legally authorized to serve the summons, dismiss the case without prejudice to further proceedings."

On the application of the complainant the present case was stated, requiring the opinion of the Court as to whether the Justices were correct in point of law in their determination.

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the appellant.

W. G. Gibson, by leave of the Court, was heard on behalf of Patrick Madden, a process-server of the district, in support of the order of the magistrates.

Nov. 8.

LORD O'BRIEN, L.C.J.:—

In this case two questions arise. One, whether, when a constable prosecutes under the provisions of the 13th and 20th sections of the Sale of Food and Drugs Act, 1875, the prosecution by him is a constabulary prosecution, or a prosecution by an individual constable charged with the prosecution of the Sale of Food and Drugs Act? We are of opinion that the prosecution is not a constabulary prosecution within the meaning of the 12th section of the Petty Sessions Act, but is, within the meaning of the 13th and 20th sections of the Sale of Food and Drugs Act, a prosecution by an individual, though that individual is a constable. Under the 13th section of the Act certain individuals therein described and specified, and amongst others a constable, under the direction and at the cost of the local authority, may procure a

sample of food or drugs for the purpose of analysis, and by the 20th section, when the analyst, having analysed any article, shall have given his certificate of the result from which it may appear that an offence against some one of the provisions of the Act has been committed, the *person* causing the analysis to be made may take proceedings for the recovery of the penalty imposed by the Act. The words of the section are: the person causing the analysis to be made. That is to say, any one of the specified individuals causing the analysis to be made may take proceedings. It is the individuals charged with the execution of the Act are made the prosecuting authority. So, in the present case before us, the constable, an individual, and as such distinguished from the body of the constabulary, is constituted by the language of the 20th section the *person* to take proceedings. Moreover, it is to be remembered that the cost of prosecution by the constable does not come out of any fund applicable for the maintenance of the constabulary, nor are the penalties recovered, or any part of them, applicable for the maintenance of the constabulary as a body. They are to be disposed of according to the 26th section of the Sale of Food and Drugs Acts. The Registrar of the Court has called our attention to a case of *Butler* v. *M'Carthy* (1), where the point now under discussion arose. It was expressly abandoned by the counsel of the Attorney-General of the day on his instruction; but we thought it better to go fully into the question, as it might be alleged the point was ruled by consent.

The next question is, whether it was, under the 12th section of the Petty Sessions Act, competent for a magistrate to indorse a summons for service by a constable. After consideration we think it was not competent for a magistrate so to do. Section 12, clause 2, of the Petty Sessions Act is as follows:—[His Lordship read the clause.] The case does not come within the first branch of the second clause of the section. It is not an offence prosecuted by the constabulary. Does it come within the concluding words of the second clause? What are they? "Or (if the Justice issuing the same shall so direct or permit) by any other person whom the complainant shall employ, and who shall be able to read and

(1) Unreported.

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write." Whom the complainant shall employ. What do these words import? An ability to employ in the person who purports to employ, and an ability to be employed by the person who may be sought to be employed. This ability does not exist in the case of a constable under the circumstances of the present case. A constable cannot be employed by one of the public to do work outside constabulary duty, nor can a constable accept any such employment. It would be inconsistent with his duty and functions as a member of the constabulary force; nor does the condition that the person employed shall be able to read and write point to the constabulary. A constable must know how to read and write by reason of the requirements of the constabulary force. This provision points to a class among whom there may be persons who do not know how to read and write—a class out of which the complainant might or might not wish to employ an individual, but is prevented from so doing by the fact that the individual sought to be employed does not read or write. This disability could never attach to the class to which constables belong, and the fact of its existence points in my opinion to a class other than the police.

MADDEN, J.:—

In my opinion the circumstance that a constable has been selected as the person entrusted with the enforcement of the Act by the local authority, and for the purpose of procuring a sample, does not render the prosecution which ensues a prosecution by the constabulary. When offences in this country are prosecuted by the constabulary, the expenses of the prosecution appear under the Law Charges vote. But in a prosecution by a constable under the Sale of Food and Drugs Act, 1875, the expenses are borne by the locality, and any penalty recovered goes in aid of such expenses. This fact is in my opinion sufficient to decide the first question raised in this case.

The second question is one of somewhat more difficulty. This not being a prosecution by the constabulary, the latter part of sect. 12, sub-sect. 2, of the Petty Sessions Act, 1851, applies; and the question arises whether, in a prosecution other than by the constabulary, the summons can be indorsed to a constable for service.

In such prosecutions the summons may be served by the summons-server of the district, or (if the Justice issuing it so direct or permit) by any other person whom the complainant shall employ, and who shall be able to read and write. Outside these two alternatives this part of the section does not authorize any mode of service. Now as the summons-server of the district cannot be a constable, the question is can a constable, by direction of the Justice, be employed by the complainant as a process-server. In my opinion he cannot. It might as well be contended that a sergeant in the nearest military barracks might be so employed. I think that the word "employ" is quite inapplicable to the case of a constable. I agree with my lord that the reference in the section to ability to read and write points to a class which may include persons unable to read and write, and would not therefore be applicable to the constabulary, but my decision turns on the word "employ."

WRIGHT, J.:—

I concur in the judgment of the Court, and wish to add only a few words. Two questions arise in this case—first, is this an offence "prosecuted by the constabulary" within the meaning of sect. 12, sub-sect. 2, of the Petty Sessions Act, 1851? The prosecution is for an offence under sect. 6 of the Sale of Food and Drugs Act, 1875. By sect. 12 of that Act any purchaser of an article of food or a drug, that is to say, any member of the public, in a place where there is an analyst appointed under the Act, is entitled to have the article analysed, and to receive a certificate of the result from the analyst. By section 13 any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable, under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of the Act, may procure a sample of food or drugs and have it analysed, and obtain a certificate of the result of the analysis from the analyst. When this certificate has been obtained, whether by a purchaser under section 12, or by any of the officers mentioned in section 13, if it shows that an offence under the Act has been committed, the person causing the analysis to be made is authorized by sect. 20 to take proceedings for recovery of the penalty

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imposed for such offence. In the present case the proceedings were taken by a person who happens to be a constable, but they were, in my opinion, taken by him not as a constable but as a person acting under the direction of the local authority as provided by sect. 13. This view is strengthened by sections 26 and 29. By sect. 26, where in a prosecution by a constable a penalty is recovered, it is to be paid to the authority for whom he acts, and applied towards the expenses of executing the Act, and by sect. 29 the expenses of executing the Act are directed to be borne in counties by the grand jury cess, and in boroughs by the borough fund or rate. Having regard to the several sections of the Act of 1875 to which I have referred, I am of opinion that this is not a case of an offence "prosecuted by the constabulary" within the meaning of sect. 12, sub-sect. 2, of the Petty Sessions Act.

As to the second point, viz. whether the direction of the Justice empowered the constable to serve the summons; at the close of the arguments I was inclined to think that it did. But on consideration I have arrived at the same conclusion on this point also as the other members of the Court. Sect. 12, sub-sect. 2, of the Petty Sessions Act divides offences into two classes—(*a*) offences prosecuted by the constabulary—we have unanimously decided that this is not a constabulary prosecution—and (*b*) all other cases, including therefore the present case. In this second class the summons may be served by the summons-server of the district, or (if the Justice issuing the same shall so direct or permit) by any other person whom the complainant shall employ, and who shall be able to read and write. I think that the spirit of the Act was to exclude service by a constable in this class of case. The provision requiring the qualification of ability to read and write would be unnecessary in the case of a member of the Royal Irish Constabulary. Moreover, the word "employ" does not, I think, properly apply to the case of one constable asking or directing another to do an act of this kind. Accordingly, on this point also, I agree with the other members of the Court.

Solicitor for the appellant: *Malachy J. Kelly.*
Solicitor for Patrick Madden: *J. C. Ryan.*

J. G. T.

KING *v.* THE GUARDIANS OF DELVIN UNION (1).

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Nov. 14, 22.

Lunacy (Ireland) Act, 1867 (30 & 31 *Vict. c.* 118), *s.* 10—*Lunatic Asylums (Ireland) Act*, 1875 (38 & 39 *Vict. c.* 67), *s.* 14—*Order of Justices—Reasonable remuneration to medical officer—Reasonable expenses—Certificate of order—Stamp—Petty Sessions Clerks (Ireland) Act*, 1858 (21 & 22 *Vict. c.* 100), *s.* 14, *Sch. C.*

Justices made an order on the Guardians of the Union, under sect. 14 of the Lunatic Asylums (Ireland) Act, 1875 (2), for payment to a medical officer of the sum of £2 as reasonable remuneration for his "loss of time and professional service" in examining a lunatic. At the time the order was made the Justices were aware that expenses had been incurred by the police in the conveyance of the lunatic:—

Held, that the order was bad, inasmuch as it awarded compensation to the medical officer for loss of time as well as for professional services:—

Held, by Lord O'Brien, L.C.J., and Wright, J. (Madden, J., *diss.*), that the "other reasonable expenses" referred to in the section are not confined to expenses of the medical officer, but would include expenses of the police incurred in connexion with the conveyance of the lunatic prior to his committal.

Held, that a certificate of an order made under the section is not "certificate of order" within Schedule C. of the Petty Sessions Clerks Act (Ireland), 1858, and does not require a stamp.

CASE STATED on hearing of civil-bill appeal by Kenny, J., from which the following facts are taken:—

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

(2) Lunatic Asylums (Ireland) Act, 1875, sect. 14: "Notwithstanding anything in sect. 10 of the Lunacy (Ireland) Act, 1867, to the contrary, it shall be lawful for any two Justices causing any person to be examined by any medical officer as therein mentioned, if they think fit so to do, to make an order under their hands and seals upon the guardians of the union to which such person belongs, for the reasonable remuneration of such medical officer, and for the payment of all other reasonable expenses in or about the examination of such person, not exceeding in the whole the sum of two pounds. All moneys so ordered to be paid by the guardians of such union shall respectively be advanced, paid, and raised in like manner as any other moneys required for supporting and maintaining the destitute poor of such union."

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KING v. GUARDIANS, DELVIN UNION.

Three individuals being alleged to be dangerous lunatics, two Justices for the county Westmeath caused them to be examined by the plaintiff, the medical officer of the dispensary district of Castlepollard. The plaintiff certified that the three persons were dangerous lunatics, and they were accordingly duly committed to the Mullingar Lunatic Asylum. Thereupon the Justices, in alleged pursuance of 38 & 39 Vict. c. 67, s. 14, made three orders under their hands and seals upon the defendants, the guardians of the union to which the three persons belonged, for the payment to the plaintiff of the sum of £2 in each case "as reasonable remuneration for his loss of time and professional services" in making such examination as above mentioned. These orders did not bear any stamp. They were in the following form, the name of the person examined being in each case filled in :—

[38 & 39 VICT. c. 67, SECT. 14.]

CERTIFICATE OF ORDER FOR PAYMENT TO MEDICAL OFFICER IN LUNACY CASES.

Petty Sessions District of Castlepollard. Poor Law Union of Delvin. Electoral Division of Hilltown, County of Westmeath.

WE the undersigned, two of his Majesty's Justices of the Peace for the County of Westmeath, having on this day caused one , at Ballymanus, in the Electoral Division and Poor Law Union as aforesaid, to be examined before us at Castlepollard aforesaid, by Dr. J. C. King, J.P., the Medical Officer of the Dispensary District in which we are now sitting, who has certified to us that the said is a dangerous lunatic, do hereby order that the said Doctor King be paid the sum of £2 by the Guardians of the Poor of the aforesaid Poor Law Union of Delvin as reasonable remuneration for his loss of time and professional services examining for us the said , whom we have committed on this day to the Lunatic Asylum at Mullingar, as a dangerous lunatic, on the medical certificate of the said Doctor.

Signed, &c.,

To THE GUARDIANS OF THE POOR
OF THE POOR LAW UNION OF DELVIN.

Certain other reasonable expenses were incurred in each of the three cases, such as the conveyance of the lunatics and subsistence

of the police. The Justices were aware when they made their order that these expenses had been incurred.

The defendants contended:—(*a*) That the orders should be stamped, and, not being so, were inadmissible in evidence; and they relied on 21 & 22 Vict. c. 100, Schedule C. (*b*) That section 14 of 38 & 39 Vict. c. 67 authorized an order for not more than £2 to cover the doctor's fee and all the other reasonable expenses above mentioned, and the Justices should have made provision for them out of the £2 allowed by the statute in each case. (*c*) That in allocating the entire sum of £2 in each case to the medical officer the Justices acted *ultra vires*, and the orders were void.

The questions for the opinion of the Court were:—

(1). Were the orders admissible in evidence without a stamp?

(2). Were the orders valid orders within the 14th section of 38 & 39 Vict. c. 67.

Denning (with him *Henry, K.C.*), for the defendants:—

The order which is made under section 14 of the Lunatic Asylums (Ireland) Act, 1875, is bad, inasmuch as the whole £2 is given to the medical officer; provision should have been made out of such £2 for the other reasonable expenses, viz. those incurred by the police. It is also bad on the ground that remuneration is given to the plaintiff, not merely for professional services, but also for loss of time; this is not authorized by the section.

This is a certificate of an order, and therefore as provided by 21 & 22 Vict. c. 100, sect. 14, Sch. C, it should have borne a stamp of one shilling. Not bearing such stamp, it is not admissible in evidence.

Matheson, K.C., and *Brunskill*, for the plaintiff.

The other reasonable expenses referred to in section 14 of the Lunatic Asylums (Ireland) Act, 1875, mean the reasonable expenses of the medical officer in and about the examination of the alleged lunatic: no expenses other than those of the medical officer can be allowed under that section. The section is an amending one, intended solely to benefit the medical officer, and to remove the hardship from which he suffered under section 10 of the Lunacy (Ireland) Act, 1867, in being obliged to examine the

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alleged lunatic without fee or reward. The police expenses are provided for by another statute, the Constabulary (Ireland) Act, 1851, sect. 4, and are payable out of a different fund: 47 & 48 Vict. c. 36, sect 2. The words in the order for "loss of time" are mere surplusage, and do not vitiate the order.

No stamp is necessary. The certificate of order referred to in Schedule C to 21 & 22 Vict. c. 100 is the certificate of an order such as mentioned in sect. 21 of the Petty Sessions (Ireland) Act, 1851, viz., an order required by sub-sects. 1 and 2 of that section to be entered in the order book. It does not refer to the certificate of an order such as the present.

Henry, K.C., in reply :—

The Constabulary (Ireland) Act, 1851, sect. 4, applies only to the expenses of a prisoner; it does not apply to expenses incurred before the order of the Justices is made. There may also be expenses incurred by the relatives of the alleged lunatic in bringing him to the medical officer, and these are intended to be provided for.

The words of sect. 14 of 21 & 22 Vict. are perfectly general: "every document enumerated in Schedule C to this Act annexed." The enumeration in Schedule C of a solemn declaration shows that the documents required to be stamped are not merely documents connected with Petty Sessions proceedings. [He referred to *Coghlan* v. *Woods* (1).]

Cur. adv. vult.

Nov. 22.

LORD O'BRIEN, L.C.J. :—

The facts which give rise to the present controversy are succinctly set forth in the case reserved for our determination by my brother Kenny. It is not necessary to refer to them in any detail. Certain Justices of the Peace purported to make an order under the 14th section of the 38 & 39 Vict. c. 67. The question is, whether the particular order was justified by the section. Now, what was the order? It was as follows :—[His Lordship read the order.]

This is the order that was made. It was impeached on several

grounds. First, it was said that the magistrates had no power to award compensation for loss of time. I am of opinion that this contention is well founded. The section gives no express authority to do so. There are no such words in the section. It is really hard to determine what is meant by loss of time. Does it mean the time during which the doctor might be otherwise employed? Are you to take into consideration the number of his patients, their diseases, their constitutions, and their solvency? Are you to take into consideration the nature of the locality, whether it is sanitary or the reverse—whether there is an epidemic or a partial or entire freedom from disease. These and kindred considerations would be involved in measuring the value of the services of a doctor by the hour or by the day, or by the mere standard of time. This is not contemplated by the section, and an order which makes it, under a distinct heading, a test of what the doctor is to get is not sanctioned by the section.

This question is raised on the face of the order. Compensation for loss of time is expressly awarded, and as this cannot be done, the order is, in our opinion, invalid. The doctor is not to be given, so to speak, a fancy fee. The comparative value of his services, as compared with other doctors, is not to be gone into. He is to be regarded merely as a qualified medical man, and the character of the case may be also regarded—whether it is difficult to diagnose or not—whether one examination or more may be necessary for its diagnosis. The doctor is to get reasonable remuneration, that is to say, he is to be reasonably remunerated for his professional services. He is to be remunerated for his medical examination—for his examination, as a doctor, of the person submitted for examination.

The words in the section, "all other reasonable expenses in or about the examination of such person," proved the subject matter of a very earnest controversy. What was the meaning of those words? Were they conversant with expenses incurred by the doctor exclusively in relation to the examination, or did they include expenses that may be incurred by others? I think they meant what they plainly express—expenses attending the examination without limitation of person. That is to say, whether incurred by the doctor, or by a constable of police who brought

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the patient to the doctor for examination. For instance, if a doctor hired a car and went to the patient's house to examine him, he would be entitled to what he reasonably paid for the car; but if a policeman hired a car to bring the patient to the doctor, he would, under the section, be entitled to be recouped the money he paid. In fact, if the constable of police was not paid in this way, he would not be paid at all, for, in my opinion, such a charge would not come under County at large charges. The expense of attending the examination would be always of a very meagre character. The patient and the doctor would, in such cases, be never very distant from each other, and doctors, I think, would not grumble if they got a guinea for diagnosis of the mental condition of the ordinary dangerous lunatic, who, if I may use the expression, bears upon his sleeve the symptoms of his lunacy—and nineteen shillings would well repay any travelling expenses, whether incurred by police constable or doctor. It would, in my opinion, generally far transcend them. It is said, because the 14th section of the 38 & 39 Vict. c. 67 purports to be an amending section, to provide a fee for a doctor who got nothing before, that expenses attending an examination must be limited to expenses incurred by the doctor alone. I cannot at all accept this contention. To accept it would, in my opinion, be to ignore the language of the section. In fact, it would be to introduce words into the section which are not to be found in it. What was plainly, in my judgment, intended to be provided for, were the expenses incurred in and about the examination, by whomsoever these expenses were incurred; and £2 was inserted as a limit to prevent abuse and to provide for that which did not exist before, namely, the remuneration of the doctor who made the examination, and payment of the expenses incurred in reference to the examination. It is never to be lost sight of that the £2 was given for doctor and expenses, where nothing at all was given before for either doctor or such expenses as I have indicated.

One question remains: Should the certificate of the order be stamped? I think not. It is provided that certificates of orders should be stamped. I think that this applies only to orders required to be entered in the Petty Sessions book. This is not such an order, and there is no provision requiring it to be stamped.

MADDEN, J.:—

It has been stated that this case has been brought before us in order to obtain the decision of the Court upon two important questions in which the medical profession is interested. I cannot help regretting the selection for this purpose of the particular orders with which the present case is conversant, for they unfortunately present a difficulty of a special character unconnected with the general questions which have been discussed.

The order or warrant before us was made under the 10th section of the Lunacy (Ireland) Act, 1867. This section provided that when any person answering to the statutory description of a dangerous lunatic is brought before two Justices, the Justices shall call to their assistance the medical officer, or if there be more than one the nearest available medical officer, of the dispensary district in which they shall be at the time, and, if there shall not be any such medical officer available, then the nearest available officer of any neighbouring dispensary district, who shall examine such person "without fee or reward." If the medical officer certifies that the person so brought before the Justices is a dangerous lunatic, they may "by warrant under their hands and seals" direct him to be taken to the district lunatic asylum, to be treated in the same manner as if he had been in the first instance committed to gaol under 1 Vict. c. 27, and afterwards removed to a lunatic asylum by warrant of the Lord Lieutenant under the provisions of 1 Vict. c. 27.

The document before us is erroneously headed as certificate of an order. It is in reality a statutory warrant under the hands and seals of the Justices. The schedule to the Petty Sessions Clerks Act relates to orders entered in the Petty Sessions book. The warrant of the Justices is not so entered, and does not become a "certificate," so as to come within the provisions of a statute imposing taxation, by being so called. I am, therefore, of opinion that it did not require to be stamped.

Under the section which I have quoted the medical officer is required to examine the alleged lunatic "without fee or reward," as part of the duties of his office, covered by his salary as medical officer. It was afterwards considered that the medical officer had a claim for remuneration for duties of an exceptional character in

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connexion with which he might have incurred some expense; and occasion was taken when the Lunatic Asylums (Ireland) Act of 1875 was passed to amend the 10th section of the former statute in this particular. The 14th section provides that, notwithstanding anything in the 10th section of the former Act to the contrary, it shall be lawful for the Justices, "if they think fit so to do, to make an order under their hands and seals upon the guardians of the union to which such person belongs, for the reasonable remuneration of such medical officer, and for the payment of all other reasonable expenses in or about the examination of such person, not exceeding in the whole the sum of two pounds," the money so ordered to be paid to become union charges.

It is found in the case that there were reasonable expenses to the knowledge of the Justices incurred, not by the medical officer, but apparently by the constabulary in the conveyance of the lunatic and of the witnesses to the Justices; and it is argued that the order or warrant is bad, inasmuch as it makes no provision for any such expenses.

I quite agree that expenses of this kind, in bringing the alleged lunatic and witnesses before the Justices, cannot be regarded as County at large expenses under the Constabulary Force Act, 14 & 15 Vict. c. 85. But I see no indication in this section before us of an intention to amend the law in this particular, or to deal in any way with County at large charges. It is, in my opinion, expressly limited by the introductory words to an amendment of the 10th section of the earlier Act. I cannot help thinking that if expenses other than those of the medical officer were in the contemplation of the Legislature, a more liberal sum would have been allowed than the nineteen shillings which would remain of the two pounds after paying the medical officer his fee of one guinea. The section, no doubt, does not in terms provide that the other reasonable expenses are to be paid to the medical officer in addition to his remuneration. But if I am right in holding that the entire section is conversant with the position of the medical officer under the section of the former statute, to which it refers, and which it was passed to amend, the omission of these words is immaterial, for they must be implied to give effect to the section, so interpreted.

Unfortunately for the validity of the order before us it awards compensation for loss of time. In a certain sense all professional remuneration is founded on an expenditure of time. But I do not think myself at liberty so to interpret the words in this order. I read these words as relating to something over and above the reasonable remuneration of the medical officer; and on this ground I regret that I am compelled to hold that the order is in excess of the statutory authority, and is therefore bad.

WRIGHT, J.:—

I desire to express shortly the opinion which I have formed on the questions brought before us. The case stated by Kenny, J., is conversant with three orders made by the Justices, allowing the plaintiff the sum of £2 in each case as reasonable remuneration for his loss of time and professional services in the examination of three persons alleged to be dangerous lunatics. The case finds certain matters of fact in relation to these orders, viz., that they do not bear any stamp; that certain other reasonable expenses were incurred in each of the three cases, such as the conveyance of the lunatics and subsistence of the police; and, what I think important, that the Justices were aware when they made their orders that these expenses had been incurred.

Three questions were argued before us. The first of these which I shall consider is the question whether the orders ought to have provided for the payment in each case, out of the £2 which the Justices are authorized to allow, of the expenses incurred by the police in the conveyance of the lunatics. The second question turns upon the peculiar form of order made in the present case. The third question is whether the orders should bear a stamp.

I proceed to deal with the first question. Under the Lunatics (Ireland) Act, 1838, sect. 1, the practice was that dangerous lunatics were committed to gaol by a warrant of two Justices. This practice was prohibited by sect. 9 of the Lunacy (Ireland) Act, 1867; and by sect. 10 of that Act a new procedure was substituted, viz., that the Justices should call to their assistance the medical officer of the dispensary district, or, if he were not available, the nearest medical officer of any neighbouring dispensary district, who was to examine the person without fee or reward; and, on his certify-

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ing the person a dangerous lunatic, the Justices might direct him to be taken to the County Lunatic Asylum. It is to be observed that under that section the medical officer was to make the examination "without fee or reward," and this was the state of the law from 1867 down to 1875, when the 38 & 39 Vict. c. 67 was passed, upon the 14th section of which the present question arises. That section is as follows:—[His Lordship read the section.]

Undoubtedly that section is an amending section. It repeals the prohibition in section 10 of the Act of 1867 against the medical officer getting any fee or reward, and I agree with my brother Madden that it must be read bearing this in mind. But, in my opinion, the words "all other reasonable expenses" not merely admit of the wider construction contended for by the defendants, but coerce us to such wider construction. I therefore agree with my Lord that these words must not be restricted to expenses incurred by the medical officer, and I think that the contention of the plaintiff that whatever sum is awarded by the Justices, whether the maximum of £2, or a lesser sum, must go to the medical officer, is not sustainable.

The argument has been put forward that the expenses other than those of the medical officer, which other expenses were in the present case incurred before the examination, are provided for by another Act, the Constabulary (Ireland) Act, 1851, section 4 of which throws these expenses on the County at large, and that it would be absurd to have two Acts over-lapping each other, one throwing the expenses on the ratepayers of the Union, and the other on the County at large. I do not think, however, that these statutes over-lap each other as is suggested. Section 4 of the Constabulary Act, 1851, deals with expenses incurred in conveying a *prisoner* for examination before Justices, and clearly applies only to expenses incurred when the person was a prisoner. But in the present case the expenses of conveyance were incurred before the persons were prisoners, since they were not prisoners until examined by the medical officer, certified by him to be dangerous lunatics, and a warrant issued by the Justices for their being taken to the asylum.

The second point is as to the form of the order. As my brother Madden has pointed out, it is unfortunate that in what was

intended to be a test case the orders selected should be of an unusual form. I agree with the other members of the Court that the orders are bad because they allow the medical officer remuneration, not only for professional services, but for loss of time.

The remaining question is, whether it is necessary that the orders should bear a stamp. We are all of opinion that a stamp is not required. As is well known, orders may be made by Justices out of Petty Sessions, and orders of a particular class made out of Petty Sessions must within a certain time be entered in the Petty Sessions order book. The Petty Sessions Clerks (Ireland) Act, 1858, which incorporates the Petty Sessions (Ireland) Act, 1851, provides, by sect. 14, that every document enumerated in Schedule C to the Act shall bear a stamp of the amount set opposite to it in the schedule, and the schedule sets out one shilling as the amount of the stamp on every "certificate of order." In my opinion this applies only to orders which, whether made out of, or in, Petty Sessions, must be entered in the Petty Sessions order book, and does not apply to orders such as we are dealing with here, which are not entered in this book.

Solicitors for the plaintiff: *A. & J. Robinson.*
Solicitor for the defendants: *N. C. Downes.*

J. G. T.

K. B. Div.
1906.
Dec. 14.

Appeal.
Dec. 20.

TIMOTHY *v.* DAY (1).

(1906. No. 10,795.)

Public service—Gratuity to employee—Judgment—Receiver—Superannuation Act, 1859.

A gratuity to a person who, having been an employee in the public service, has been constrained to retire from ill health, awarded by Lords Commissioners of the Treasury, under section 6 of the Superannuation Act, 1859, is not attachable by process of law to answer a judgment recovered against such employee.

MOTION on behalf of the Postmaster-General to discharge an *ex parte* order, dated the 9th November, 1906, obtained by the plaintiff who had recovered judgment for £35 and costs in the action, appointing the plaintiff receiver by way of equitable execution over a certain gratuity to which the defendant was entitled from the General Post Office, Dublin.

It appeared from the affidavit of R. A. Egerton, Secretary to the Post Office in Ireland, that the defendant had been an employee of the Post Office as sorting-clerk and telegraphist from November, 1897, to the 17th August, 1906, when he was compelled to retire in consequence of pulmonary disease, which rendered him permanently incapable of discharging the duties of his situation. His length of service did not entitle him to a pension, and the Post Office authorities recommended him to the Lords Commissioners of the Treasury for a gratuity, and he was awarded by them on the 21st September, 1906, a sum of £37 19*s.* 9*d.*, under the provisions of the Superannuation Act, 1859 (22 Vict c. 26), s. 6 (2).

(1) In the King's Bench Division, before ANDREWS and JOHNSON, JJ.

(2) "It shall be lawful for the Commissioners of the Treasury to grant to any person who, being the holder of an office in respect of which a superannuation allowance may be granted, is constrained, from infirmity of mind or body,

The letter of the Treasury, notifying the award of the gratuity, was as follows:—

"TREASURY CHAMBERS,
"21*st September*, 1906.

[16657/1906]

"SIR,—The Lords Commissioners of His Majesty's Treasury have had before them the case of Mr. Edward Day, sorting-clerk and telegraphist, Dublin, which was submitted on the 15th instant, and I am directed by their Lordships to acquaint you that they have been pleased to award him a gratuity of £37 9*s.* 9*d.*

"I am, Sir, your obedient servant,

"E. V. HAMILTON.

"THE POSTMASTER-GENERAL."

Samuels, K.C., and *The Hon. Cecil Atkinson*, for the Postmaster-General, in support of the motion.

Dudley White, for the plaintiff.

ANDREWS, J.:—

We have had the question in this case ably and fully argued on both sides, and we do not feel it necessary to reserve our judgment.

By an order made on the 9th November last the plaintiff was appointed receiver by way of equitable execution over so much of a sum of money of between £30 and £40, representing a gratuity under the Act which I shall refer to, as would be sufficient to satisfy the plaintiff's judgment against the defendant. That order was served on the defendant and also on the Secretary of the General Post Office, Dublin, and it does not appear to me to be material that the defendant does not appear to object to the order, as his interests are represented and protected by the Postmaster-General.

The application now before us at the instance of the Postmaster-General to discharge that order is not by reason of any technical objection to the terms in which it is framed. It is not an

to leave the public service before the completion of the period which would entitle him to a superannuation allowance, such sum of money by way of gratuity as the said Commissioners may think proper, but so as that no such gratuity shall exceed the amount of one month's pay for each year of service."

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TIMOTHY v. DAY.

Andrews, J.

application to alter it so as to empower the plaintiff to receive and give an acquittance for the whole amount, and pay the balance after satisfying his judgment to the defendant. It is an application that the order should be discharged on the ground that the sum in question is not attachable by a receiver order, and cannot be in this way prevented from reaching the hands of the defendant.

Counsel have been unable to refer to any authority, and I am not myself aware of any, deciding whether a gratuity such as this is or is not attachable either by a receiver order or any similar process. It is plainly not a debt, and could not be the subject of a garnishee order. We therefore have to determine, for the first time, whether a gratuity granted under an Act passed so long ago as 1859 can be attached by a receiver order.

A number of cases have been cited, but I think section 6 of the Act 22 Vict. c. 26, under the provisions of which gratuities of this kind are granted, affords all the materials necessary for the purpose of coming to a conclusion on this question. That section is as follows :—[His Lordship read the section, *ante*, p. 26.]

A reference to sect. 2 will show the obvious difference between the wording of that section and of sect. 6.

The principle which underlies the cases which have been cited is, that the subject over which a receiver may be appointed by way of equitable execution must be something in which the debtor has an interest in the nature of property to which he has a right. The gratuity here is not only a mere voluntary allowance, as distinguished from anything which the defendant has a right to, but a voluntary allowance which is appropriated for the exclusive personal benefit of the person to whom it is granted, he and he alone being the person to receive it. This, I think, is manifestly the meaning of the 6th section of the Act. When he does receive it, it no doubt becomes property in his hands, but until he actually receives it, its voluntary character, in my opinion, continues : and before he receives it, it is not property which can be made available for his creditors. I think the Treasury and the Postmaster-General acting as the medium through which the gratuity is paid are not only entitled but bound (having regard to the terms of the 6th section) to see that the gratuity when granted, coming as it does

out of public money, reaches the hands of the person to whom it is granted. If it were captured by a receiver order, it would not reach his hands, nor fulfil what, in my opinion, was clearly the intention of the Legislature, viz., that it should be given to the grantee for his own individual personal benefit, and not for the liquidation of his liabilities.

It was urged by Mr. Dudley White that, as the money in this case may be regarded as having come to the hands of the Postmaster-General, with authority to pay it to the defendant, the Postmaster-General must be regarded as agent or trustee for the defendant, so as to make the money in his hands the money of the defendant, and therefore his property; but I cannot regard the Postmaster-General as either the agent or trustee for the defendant. He is only the medium through which the gratuity is to be given to the defendant; and its voluntary character continues until it reaches the hands of the defendant, up to which time he has no property in it properly so called—that is no right by which he could enforce payment of it.

We are of opinion, therefore, that the receiver order should be discharged. As the question raised was a new one in relation to these gratuities, we would not have given costs; but the Postmaster-General does not ask for them.

JOHNSON, J.:—

I am of the same opinion. The gratuity is authorized for the peculiar personal benefit of a man whose office was one entitling him to superannuation if he had remained in it, but who is so afflicted mentally or bodily as to be unable longer to continue in the public service and earn a pension for his support—and it is left entirely in the discretion of the Treasury (subject to the limit imposed by section 6) to measure the extent of their gratuity according to the infirmity, mental or bodily, of the grantee. I was for a time struck with Mr. White's argument that the money having come into the hands of the Postmaster-General (for he has money appropriated for the purpose of paying this gratuity), he thereby became trustee of it for the defendant. But Mr. Atkinson has satisfied me that a public servant such as the Postmaster-General cannot be or be made liable as trustee to the jurisdiction

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Johnson, J.

of the Court in this case; and I am of opinion that until this money has actually passed into the pocket of the grantee it is not property which can be applied by him for any purpose he may think fit. Until it actually reaches him I think that it remains in the hands of the Postmaster-General, impressed with its original character, to be given to the grantee as a voluntary gift made in respect of the infirmity of mind or body which constrained him to leave the public service.

J. G. T.

Appeal. Dec. 20.

The plaintiff appealed (1).

Dudley White, for the appellant.

A. W. Samuels, K.C., and *The Hon. Cecil Atkinson*, for the respondent.

THE LORD CHANCELLOR :—

We are all of opinion that the order appealed from is right, and must be affirmed. The question really depends on the nature of this gratuity, and in considering it the words of section 6 of 22 Vict. c. 26 are important, and are, as pointed out by Mr. Justice Andrews, in marked contrast to the words in section 2. Section 6 is as follows :—[His Lordship read the section, *ante*, p. 26.]

What is contemplated there is a compassionate allowance, founded neither on a right to receive on the one side, nor an obligation to pay on the other; and the gratuity retains its character as such, and is not altered until the last moment, when it reaches the hands of the person for whose benefit it is intended.

This man, Day, was a salaried servant. It is a matter of detail that he was the servant of a great public department, and performing duties of public importance. The ordinary principles of law must apply in the case of a gratuity to such a man; and if an ordinary employer indicates his intention of giving a gratuity

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

to his servant, the sum so intended to be given could not be attached by way of equitable execution, or become available for payment of debts until it had been actually given into the man's hands. If I instruct my banker to pay to a servant of mine a sum of say £1 a week, as a gratuity, can I not revoke that at any time? It is quite clear I could, and that such a sum could not be attached.

The Postmaster-General is represented here in order to obtain a decision not whether he may, but whether he must, pay anyone else than the object of this compassionate allowance. The word "must" is inapplicable to his case, and *Webber's Case* (1) appears to me an exact authority in point, and to afford the true principle for the determination of the present case. The case of salary of a school teacher accrued due stands in a different position altogether. This is a voluntary payment. It retains its character of a compassionate allowance until it reaches the hands of the employee, and as such it cannot be attached.

The order appealed from is right upon principle, and for the reasons upon which it was based, and the appeal must be dismissed.

FITZGIBBON, L.J.:—

In *Picton* v. *Cullen* (2) the Lord Chief Baron yielded to an argument somewhat similar to that which has now been presented on behalf of the Postmaster-General; but this Court did not agree that it was against public policy to attach a school teacher's salary for payment of his debts. I mention that case because I base my present decision upon the ground that a *gratuity* cannot be made the subject of equitable execution, and I say nothing as to the case either of a superannuation allowance, or of a payment made by way of compensation, as distinguished from a gratuity or compassionate allowance.

The fallacy in Mr. White's argument consists in assuming a relation between the Postmaster-General and the Treasury which, in my opinion, does not exist. There is no relation of agency between the Postmaster-General and either the Treasury or Day.

(1) 18 Q. B. D. 111. (2) [1900] 2 I. R. 612.

Appeal. 1906.

TIMOTHY v. DAY.

Fitz Gibbon, L.J.

The payment was to be made by way of gratuity out of public funds, and its character as a gratuity could not be affected by the procedure between the Government Departments. The money must remain a gratuity until it is handed to the individual for whom it is intended. There could be no "equitable execution" to compel payment of it to an assignee, when the individual recipient could not compel payment of it to himself. It never became a debt, nor "money had and received to the use of the defendant," and being a gratuity from the beginning to the end it cannot be attached.

HOLMES, L.J.:—

I concur. I consider that this sum of money which the Postmaster-General may pay, and which, having regard to the minute of the Treasury, he ought to pay, cannot be considered up to the present time the property of the debtor, and I think that, in order to make it his property and his money, there must be delivery of it to him as the person intended to be benefited.

Solicitors for the appellant: *J. H. Walsh & Co.*
Solicitor for the respondent: *J. R. Baillie Gage.*

R. ST. J. C.

Appeal. 1907.

April 19.

THE KING (THE POSTMASTER-GENERAL) *v.* THE GREAT NORTHERN RAILWAY CO. (1).

Practice—Costs—Proceedings on behalf of the Crown—Mandamus—9 & 10 *Vict. c.* 113, *s.* 5—18 & 19 *Vict. c.* 90.

The prosecutor obtained an order from the King's Bench, that a writ of mandamus should issue against the defendants, and the defendants appealed. Before the appeal came on for hearing the defendants gave notice to the prosecutor that they would not proceed with the appeal:—

Held, that the prosecutor was not entitled to the costs incurred before receipt of the notice withdrawing the appeal.

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal.
1907.

THE KING (POSTMASTER GENERAL) v. GT. NORTHN. RAILWAY CO.

THE Postmaster-General obtained an order from the King's Bench Division that a writ of mandamus should issue directing the defendants to run certain trains at the hours, and in the manner, specified by the prosecutor. The defendants served notice of appeal on the 11th February; and on the 26th March, they gave notice to the Postmaster-General that the appeal would not be prosecuted. The prosecutor applied for his costs of the appeal incurred before receipt of the notice of discontinuance.

Samuels, K.C., and *Dudley White*, for the Postmaster-General.

Gordon, K.C., and *Denning*, for the defendants.

THE LORD CHANCELLOR:—

This is really an attempt to re-open the question decided by the Court in *Madden's Estate* (1). We came to the conclusion in that case, that there is no jurisdiction to award costs against the Crown, unless power to do so is expressly given by statute. Counsel for the prosecutor have not been able to point to any such statute. The 18 & 19 Vict. c. 90 does not do so. We intend to follow the rule already laid down by this Court that we will not allow costs to the Crown in cases in which, if unsuccessful, the Crown would not be liable for costs.

FITZGIBBON and HOLMES, L.JJ., concurred.

Solicitor for the Postmaster-General: *J. R. Baillie Gage.*
Solicitors for the Great Northern Railway Co.: *Crawford & Lockhart.*

R. D. M.

(1) [1902] 1 I. R. 63.

Appeal.
1907.

GAWLEY *v.* CORPORATION OF BELFAST (1).

Nov. 25, 26. *Action for damages for negligence causing personal injury—Death of person injured—Action by widow more than six, but within twelve, months from the date of the accident—Statute of Limitations—Public authority, action against—Lord Campbell's Act* (9 & 10 *Vict. c.* 93)*—Public Authorities Protection Act* (56 & 57 *Vict. c.* 61), *s.* 1 (a).

On the 13th June, 1906, G. was injured by a collision with a tramcar in Belfast, and on the 30th July, 1906, he brought an action for damages for negligence against the defendants, who had taken over and were running the tramways in Belfast, under the provisions of 4 Edw. 7, c. ccxxix (Local and Personal). G. died on the 28th February, 1907, from the effect of the injuries, and, on the 11th April, 1907, his widow brought an action against the defendants on behalf of herself and her children, for damages for the death of her husband. The defendants pleaded that as Mrs. G.'s action had not been brought within six months from the alleged act of negligence, it was barred by the Public Authorities Protection Act, 1893 :—

Held (affirming the decision of the King's Bench Division), that, as the action was not brought within six months from the date of the accident, it was barred by section 1 of the Public Authorities Protection Act, 1893.

Held, also, that the defendants, in working the tramways under 4 Edw. 7, c. ccxxix, were a public authority within the meaning of the Public Authorities Protection Act, 1893.

On the 13th June, 1906, Bernard Gawley, the husband of the plaintiff, was injured by a collision with an electric tram-car in Belfast. The tramways in Belfast are the property of the defendants. He brought an action for damages for negligence against the defendants, on 30th July, 1906, and laid the venue in Dublin. This action was ripe for trial in Hilary Sittings, 1907, when the defendants, on the 14th January, 1907, moved to change the venue to Belfast. The application was granted, and the action would have been tried at the Belfast Spring Assizes in March, 1907. On the 28th February, 1907, Bernard Gawley died from the effects of the injuries he sustained ; and the present action was

(1) Before The Lord Chancellor, and FitzGibbon and Holmes, L.JJ.

brought on the 11th April, 1907, by Catherine Gawley, the widow of Bernard Gawley, on behalf of herself and her three children, to recover damages for the death of her husband, who was a blacksmith, and was the sole support of his wife and children.

In addition to a traverse of the negligence, and a plea of contributory negligence, the defendants pleaded that the matters complained of consisted of an alleged neglect or default in the execution of powers and duties conferred on the defendants as a public authority by the Belfast Corporation (Tramways) Act, 1904, and the action was not commenced within six months after the alleged acts, or neglect, or default complained of, and the plaintiff's cause of action was barred by the Public Authorities Protection Act, 1893.

The plaintiff by her reply joined issue on this defence, and further pleaded that the plaintiff's action was commenced by her less than two months after the death of her said husband, who had instituted in his lifetime at a date less than six months after the negligence of the defendants complained of, and had pending at his death, an action against the defendants for the negligence which caused the injuries in consequence of which he afterwards died on the 28th February, 1907, and the plaintiff objected that the defence pleaded as to the Public Authorities Protection Act was not a good defence in law to the plaintiff's claim.

The defendants on the 17th May, 1907, obtained an order to set down the case for hearing on the points of law raised in the pleadings in lieu of demurrer.

The case was argued in the King's Bench Division before Palles, C.B., and Andrews, J.

On the 18th June, 1907, the Court dismissed the action.

The plaintiff appealed.

D. M. Wilson, K.C., and *J. Cusack*, for the appellant:—

The order appealed from has dismissed the plaintiff's action with costs, and has necessarily decided that (1) Lord Campbell's

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Act (9 & 10 Vict. c. 93) has been impliedly repealed by the Public Authorities Protection Act in all cases where the death has been caused by any person acting in execution or intended execution of any Act of Parliament, or of any public duty or authority, and has occurred more than six months after the injuries were inflicted, and (2) that the defendants were not merely as a matter of fact, but as a matter of law, acting in execution or intended execution of the Belfast Corporation (Tramways) Act, 1904, when they inflicted the injuries on Bernard Gawley, from which he died on the 28th February, 1907.

As to the first point, the deceased had, at the date of his death, an action pending for damages for the personal injuries he had sustained, and under the terms of 9 & 10 Vict. c. 93, as amended by 27 & 28 Vict. c. 95, when, and only when, those injuries resulted in his death, and in pecuniary loss to his widow and children, the widow was entitled to bring the present action on behalf of herself and her children. In *Williams* v. *The Mersey Docks and Harbour Board* (1), where the injuries were sustained in 1902, and the death took place in 1904, it was held that the widow could not maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93), as *her husband's right of action* was, at the time of his death, barred by the Public Authorities Protection Act, and consequently the widow had, under the very terms of Lord Campbell's Act, no right of action in respect of the loss occasioned by her husband's death. It was not decided in that case that the widow could not commence her action under Lord Campbell's Act more than six months after the injuries were inflicted, provided that she commenced it within six months from the death, and that the deceased could, at the time of his death, have maintained an action for his personal injuries. In *Markey* v. *Tolworth Joint Isolation Hospital District Board* (2), it was decided that it was sufficient to commence an action under Lord Campbell's Act within six months next after the death. According to the decision appealed from, the widow's right to bring her action was extinguished on the 14th December, 1906, and her cause of action (if any) did not accrue till the 28th February, 1907. Such

(1) [1905] 1 K. B. 804. (2) [1900] 2 Q. B. 454.

a construction of the Public Authorities Protection Act is not necessary, nor could it have been intended. The 9 & 10 Vict. c. 93, is not contained in the Schedule of repealed enactments appended to 56 & 57 Vict. c. 61, which is stated to be merely "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

In *Seward* v. *Vera Cruz* (1), Lord Selborne says, where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed merely by force of such general words. This case also shows that the action under Lord Campbell's Act is a totally new cause of action, and that it arises on the death. The act, neglect, or default mentioned in sect. 1 and sect. 1 (*a*) of 56 & 57 Vict. c. 61, can receive a reasonable and sensible application by holding it to be equivalent to "cause of action," as in all other Statutes of Limitations. Sect. 1 contemplates an act, neglect, or default, in respect of which an action, prosecution, or other proceeding can be commenced, and which must, therefore, be a cause of action. Similarly, sect. 1 (*a*) speaks of "the act, neglect, or default complained of." No private individual has a right to complain of the negligent or unlawful driving *simpliciter* of the defendants' tramcars. It was only when the negligence resulted in injuries and death that the deceased and the widow respectively get their distinct causes of action. The only act, neglect, or default complained of by the plaintiff in this action was the wrongful killing of her husband on 28th February, 1907, caused by the defendants' negligence. The words "act, neglect, or default," in the statute must include the consequences of such act, neglect, or default, and cannot be confined to the act, neglect, or default, *simpliciter*: *Polley* v. *Fordham* (2). If not, in all cases where special damage is the gist of the action, and such special damage does not arise till six months after the act, neglect, or default causing it, this statute has impliedly repealed all such actions against public

(1) 10 A. C. at p. 68. (2) [1904] 2 K. B. 345.

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GAWLEY v. BELFAST CORPORATION

authorities, *e.g.*, actions of slander or subsidence: *Darley Main Colliery Co.* v. *Mitchell* (1).

As to the second point, the Court cannot decide on demurrer, or on an argument in lieu of demurrer, that the defendants were acting in execution or intended execution of an Act of Parliament, or public duty, or authority, at the time they caused the injuries. That is a question of fact on which issue has been joined, and not a pure question of law. The particular tramcar which caused the injuries may have been unlawfully on that particular street, or may with the knowledge and approval of the defendants have been driven at a speed wholly unauthorized by any Act of Parliament, or by any public duty or authority, or by the common law. The defendants took over a number of private undertakings for the purpose of making a profit, and as a commercial undertaking, in ease of the rates no doubt; but, under sect. 33 of 4 Edw. 7, c. ccxxix, the defendants are not under any obligation to run tramcars, but have an option to run them or not as they like. That being so, they cannot be held to run them, as a matter of law, in execution or intended execution of an Act of Parliament, or of any public duty or authority: *Palmer* v. *Grand Junction Railway Co.* (2); *Carpue* v. *London and Brighton Railway Co.* (3); *Parker* v. *London County Council* (4); *Lyles* v. *Southend-on-Sea Corporation* (5).

T. Harrison, for the defendants, was not called upon to argue the second question:—

This case is governed by *Williams* v. *Mersey Docks Board* (6). It is true that there is a difference in the facts of that case from those of the present; but the principles laid down by the decision show that the action cannot be maintained if brought more than six months after the act of negligence which is said to have caused the injury.

Nov. 26.

THE LORD CHANCELLOR:—

Since the adjournment we have had an opportunity of looking into the case, which has been ably argued in favour of the plain-

(1) 11 A. C. 127.
(2) 4 M. & W. 749.
(3) 5 Q. B. 747.
(4) [1904] 2 K. B. 501.
(5) [1905] 2 K. B. 1.
(6) [1905] 1 K. B. 804.

tiff. The facts of the case are—Bernard Gawley, on the 13th June, 1906, sustained a personal injury from being knocked down by a tramcar driven by the defendants' servants. He had a cause of action in respect of that, if he could prove negligence; and on the 30th July, 1906, he issued a writ in an action, the venue in which was changed to Belfast. Before the case was tried, or could be tried, he died, viz., on the 28th February, 1907. This action of tort died with him, so far as his action was concerned. But his widow, on the 11th April, 1907, brought an action against the defendants under Lord Campbell's Act.

On the first point, assuming the case was one to which the Public Authorities Protection Act applied, the widow's action being brought more than six months after the act of negligence causing the injury, was *prima facie* barred; but the answer suggested was that the widow's action was a new cause of action, which arose on the 28th February, 1907, and that the six months under the Act of 1893 ran from that date.

The first consideration which really seems to me to dispose of this part of the case is what is the true construction of the two statutes, Lord Campbell's Act (9 & 10 Vict. c. 93) and the Public Authorities Protection Act, 1893, taken together. [His Lordship read sect. 1 of 9 & 10 Vict. c. 93.] The action against the wrongdoer may be maintained, notwithstanding the death; the words are "wrongful act, neglect, or default."

There is a limitation of time in the 3rd section of twelve months, which is admittedly altered by the Act of 1893, sect. 2. [His Lordship read section 1, sub-section (*a*), of 56 & 57 Vict. c. 61.] The same words that are used in Lord Campbell's Act, "*the act, neglect, or default complained of.*" So far I have given my decision on the statutes.

The case of *Williams* v. *Mersey Docks Board* (1) involves the point. The plaintiff's husband was injured in 1902. He died in December, 1904; and the widow brought the action in February, 1905. It was held that as the deceased could not, if alive in February, 1905, have brought an action, the widow could not sue. Mathew, L.J., said:—"In this case the

(1) [1905] 1 K. B 804.

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deceased could not have maintained an action against the defendants at the time of his death, or at any time more than six months after the neglect which caused the injury." The attempted answer was that a new cause of action arose to the widow. Cozens-Hardy, L.J., said:—"The plaintiff is bound to contend that after the expiration of any period, however long, from the date of the original injury, a new cause of action arises under the Fatal Accidents Act, 1846, on the death of the injured man"; and he does not accept that view. Here, unless the pending of the action saved the case, this language applies; but the pending action of tort died with the husband, and the real contention is to import a proviso into the statute. It was said the widow must prove pecuniary damage. So she must; but the act, neglect, or default, are what the statutes deal with. The pecuniary damage clothes her with the right to sue in respect of the act, neglect, or default. The policy of the Act of 1893 is to protect public bodies from the consequences of torts committed by them after six months have passed.

In *Markey* v. *Tolworth Isolation Hospital* (1) the action was not brought till after more than six months from the death, so that it was clearly barred. The language of the learned Judges is not very clear. Bigham, J., said:—"So far as the plaintiff's cause of action is concerned, it is the same as the deceased man's would have been had he lived—the giving of the overdose of opium"; and as the action has been brought more than six months after the death of the deceased, it cannot proceed. In the subsidence cases the subsidence is the *damnum*, and creates the cause of action. The decision in *Seward* v. *Vera Cruz* (2) was only that the action under Lord Campbell's Act was a personal action on a personal liability, and a personal right to recover, and is not a proceeding *in rem*; and that case is cited by Cozens-Hardy, L.J., in *Williams* v. *Mersey Docks Board* (3) as an authority in aid of the decision he arrived at.

As to the second point—The Act, to which we are entitled to look, recites the agreement to buy the tramways, and the purchase, and in the 33rd section authorizes the defendants running the tramways. They are described in the Act as the Local Sanitary

(1) [1900] 2 Q. B. 454. (2) 10 A. C. 59. (3) [1905] 1 K. B. 804.

Authority, and they are bound to apply the receipts in aid of the rates—a public purpose. The claim in the action is that the defendants carelessly, negligently, and unskilfully drove and managed the car. That assumes the running under the Act. This point was not suggested in the Court below, where it was taken that Rule 3 of Order XXV. applied if the point of law was in the defendants' favour. It would do no good to the plaintiff to leave this alleged question of fact open.

FITZ GIBBON, L.J.;—

Though the Act of 1893 gives no definition of "public authority," the title gives an important description of its purpose—"to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties," and the schedule of "Enactments Repealed" comprises more than one hundred statutes, and shows the wide meaning of "public authorities." The last clause of section 1 is as follows:—

> "This section shall not affect any proceedings by any department of the Government against any local authority, or officer of a local authority,"

a plain declaration that "local authorities" may be public authorities for the purposes of the Act.

The first question in the present case is whether the Municipal Corporation of Belfast, in working the street tramways, is a public authority? The answer may be found in the Act which authorized the Corporation to work the tramways (4 Edw. 7, c. ccxxix.). It was contended, first, that, in that department, the Corporation was not a public authority, because it took over a number of undertakings, of which the profits belonged to certain companies. But the Act recited that the Corporation was the Urban Sanitary Authority, and that it had agreed to purchase these private tramways, in order to work them for the benefit of the community. All money made out of the tramways now goes to the fiscal account of the municipality for the benefit of the rates. They are no longer worked for private profit; the benefit is co-extensive with the duties, and both are public.

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Mr. Wilson contended, secondly, that, because the Corporation had an option not to take over the tramways at all, or not to work them, they were not worked in execution of the Public Authorities Protection Act, 1893. But the Act mentions "authority" as well as "duty." Its provisions take effect "in respect of any alleged neglect or default in the execution of any Act of Parliament, or of any public duty or authority." The statutory authority to purchase the tramways, when exercised, imposed a public duty. The Corporation is the authority which works the tramways ; and it is none the less a public authority because it had an option not to work them.

Lastly, Mr. Wilson contended that, because there was a traverse of the alleged cause of action having been in pursuance or execution of any public duty or authority the case could not be determined on demurrer. If it could be shown, or even if it had been suggested in the King's Bench, that the injury had not occurred in the ordinary working of one of the public tramways, it might be necessary to determine the question of fact. But if we sent this question to a jury now, we should be sending a merely formal traverse for trial, after the vital question of law had been decided against the plaintiff, without any affidavit, or even specific statement, to sustain the suggestion, and with all probability against the idea that the Corporation was working the tramcar that did the mischief otherwise than as a public authority. The Court below was led to believe that by its decision every material question was ruled, and we ought not now to treat the traverse as having any substance.

On the remaining point in the case—if we read the two Acts together, it is plain that the event from which the time began to run under the Act of 1893 is the same event from which the time would have run under Lord Campbell's Act. It was running against the injured man in his lifetime, and it ran on against his personal representative after his death. But the death, though an essential condition of the power to sue under the Fatal Injuries Act, does not affect the date from which the Public Authorities Protection runs. This is not like the cases where the subsidence was the cause of action, nor like *Polley* v. *Fordham* (1), where a magistrate, having convicted and

(1) [1904] 2 K. B. 345.

fined the plaintiff, afterwards issued a warrant on which a distress was levied, and the six months began to run from the wrongful entry on the plaintiff's premises, and not from the date of the conviction.

We are really asked to legislate where it is uncertain what the legislation would have been, or ought to be. It might possibly have been held that the cause of action under Lord Campbell's Act arose for the first time when the personal representative was raised. But the contrary has been decided, and the action has been barred against the personal representative, when he did not come into being until more than six months after the death. When the Act of 1893 was before Parliament, provision might have been made, in at least one or other of two ways, for the case where an action brought by the injured person was pending at his death.

An option to revive or continue it might have been given to the personal representative, or he might have been allowed a fresh period of limitation. But no one thought of it; and by the rule *actio personalis moritur cum personâ* this action died with the deceased, and no new action has been given to his representative.

The object of this statute was to give protection to public authorities, and it was given absolutely after six months had passed. No doubt it is a hard case on the widow, if the injured man had a good cause of action; but if a new action was given to the personal representative in every case of death, it would be making a special provision for a class of cases in which, of all others, protection for the public authority would be most needed, and some conditions would almost certainly have been enacted. In my judgment, the appeal must be dismissed, and our decision seems to me to follow from the decision in *The Mersey Docks Case* (1), and from the collocation of the two statutes.

HOLMES, L.J.:—

In this case two questions have been argued before us, or perhaps I ought to say three. The most important turns on the construction to be given to the Public Authorities Protection Act

(1) [1905] 1 K. B. 804.

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of 1893. In construing any statute the first thing a Court ought to have regard to is the words used in the statute; and, when words are clear and distinct, the Court ought not to go out of its way to give them a meaning different from what they ordinarily bear, in order to get over a real, or imaginary, grievance. Sect. 1 of this Act provides—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Although this is a Statute of Limitations, its language is different from what is generally found in such statutes, in that it is not within a prescribed time after the accrual of the cause of action that proceedings must be taken; but "within six months next after the act, neglect, or default complained of."

I turn now to Lord Campbell's Act, which provides that "whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages."

These are the same words that are used in the Public Authorities Protection Act, and their occurrence in the latter Act may not have been an accident. But whether or not, I think the same meaning must be given to them in both Acts, the effect of which is in my opinion to strike out the proviso as to twelve months after the death in the first Act, and to substitute for it six months after the act, neglect, or default.

It is unnecessary to refer to the case of *Williams* v. *Mersey*

Docks' Board (1) decided by the English Court of Appeal; but I agree in holding that it is impossible to distinguish it in principle, although there was a difference between it and the present case on the facts, inasmuch as the husband's right of action was in that case barred at his death. This disposes of the only question argued in the King's Bench Division.

Mr. Wilson, however, has further argued in this Court that, having regard to the terms of the Statute under which the defendants are running the tramways, the Public Authorities Protection Act does not apply. This is a pure question of law, and I shall deal with it before I close. He also asks that he be allowed to go to trial for the purpose of showing that the act or default complained of was *ultra vires*, and therefore not covered by the Statute of 1893. He does not suggest what is the question of fact which he wishes thus to raise; but as the case was treated by both sides in the Divisional Court as involving only a legal issue, I think it is now too late to enter on a fishing inquiry in the hope that it may result in discovering some question of fact to be submitted to the jury.

To go back then to the legal point, I am unable to understand the argument based on the Local and Personal Act, under which the Corporation of Belfast has taken over the tramways. It is true that its provisions do not oblige the defendants to acquire them; but, having done so under the option given them, I am satisfied that they are working them in the exercise of a public duty and authority, and are entitled to the protection given by the Statute to public authorities. For these reasons I am of opinion that the appeal should be dismissed.

Solicitors for the plaintiff: *Fisher & Fisher.*
Solicitor for the defendants: *Frank Kerr.*

R. D. M.

(1) [1905] 1 K. B. 804.

K. B. Div.
1907.

May 7, 18.

NASH *v.* NEAZOR (1).

Landlord and tenant—Purchaser—Arrears of rent—Evasion of statute—Promissory note—Land Law (Ireland) Act, 1896, *s.* 35—*Irish Land Act*, 1903, *s.* 24 (8).

A tenant purchasing under the Irish Land Act, 1903, owed two years' arrears of rent, one of which was to be paid out of the purchase-money, under section 24 (8) of the Act; and, as to the other year's arrears, it was agreed between the agent and the tenant that the agent should pay the amount thereof to the landlord, and should take from the tenant and a surety a promissory note for the amount, which note was of even date with the purchase agreement. The agent on the next day discounted the note at the bank, and subsequently paid the amount to the landlord. Before the maturity of the note the tenant made a payment on account, but afterwards failed to pay the balance when due, and the agent now sued the surety for the amount:—

Held, by Lord O'Brien, L.C.J., and Gibson, J. (Kenny, J., *diss.*), that the agreement, being intended as a contrivance to evade the scope and policy of the 35th section of the Land Law (Ireland) Act, 1896, was without consideration, and the balance due on foot of the note could not be recovered.

Special case stated by the Lord Chief Justice at the Spring Assizes, 1907.

The case stated was as follows:—

1. The plaintiffs in this civil-bill appeal by their civil bill, dated the 11th September, 1906, sued the defendant for the sum of £10, balance alleged to be due by the defendant to the plaintiffs on foot of a promissory note, dated the 11th October, 1905, and payable one month after date, made by the defendant and by John Downey of Shannongrove, who is a tenant on the Caulfield estate. The plaintiffs are agents for the said estate. The defendant was merely surety on the promissory note, and took no benefit under it. A copy of the promissory note is set out in the schedule hereunto annexed. The County Court Judge dismissed the said civil bill.

(1) Before Lord O'Brien, L.C.J., and Gibson and Kenny, JJ.

2. An appeal by the plaintiffs came before me at the Limerick Spring Assizes, 1907, and on the hearing of the appeal the following facts were proved:—

In the year 1905 the plaintiffs, as agents for the Caulfield estate, were negotiating with several tenants thereon, including the said John Downey, for the sale to them of their holdings under the Irish Land Act, 1903. The said John Downey on the 11th October, 1905, owed two years' rent of his holding. On that date it was agreed by the plaintiffs, acting as such agents, and the said John Downey, that the latter should purchase his holding under the said Act for a sum of £951, which included one of the two years' arrears, and that the plaintiffs should pay the landlord of the Caulfield estate the remaining year's arrears, receiving in consideration thereof a promissory note, signed by the said John Downey and by a surety to be approved of by the plaintiffs. The promissory note on foot of which this action is brought was made in pursuance of this agreement on the 11th October, 1905.

3. On the same date, and in pursuance of the said agreement, the usual form of agreement for the purchase of a tenant's holding under the Irish Land Act, 1903, was signed by, amongst others, the said John Downey, as tenant. The said agreement, duly executed by all the necessary parties, was lodged in the office of the Estates Commissioners on the 17th February, 1906. The lands have not as yet been provisionally declared an estate by them.

4. The plaintiffs discounted the said promissory note on the 12th October, 1905, and paid the amount thereof to the landlord on the 24th October, 1905. The said John Downey paid the plaintiffs a sum of £20 on foot of the said promissory note on the 27th October, 1905, leaving still unsettled the balance sued for in this civil bill.

5. Counsel for defendant argued before me that the balance sued for could not now be recovered, having regard to the provisions of the Purchase of Land (Ireland) Acts, and more particularly to section 35 of the Land Law (Ireland) Act, 1896. The case of *O'Shea* v. *Walshe* (1) was cited in support of this contention. Counsel for the plaintiffs argued contra.

(1) 29 Ir. L. T. R. 95.

K. B. Div. 1907. NASH v. NEAZOR.

6. The question for the decision of the Court is, whether the plaintiffs are precluded from recovering the said balance of £10 on foot of the said promissory note by reason of the provisions of the Purchase of Land (Ireland) Acts.

If the said question is decided in the plaintiffs' favour, they are to have a decree for £10, with the costs in the Court below and the costs of the appeal; and if in the defendant's favour, the dismiss is to be affirmed with costs. In no event, by consent of parties, are the plaintiffs to get the costs of the case stated.

O'BRIEN, C.J.

Dated 22nd April, 1907.

The following were the terms of the promissory note :—

"LIMERICK, 11 *October*, 1905.

"One month after date we jointly and severally promise to pay James Nash & Son, or order, at the National Bank, Limited, here, the sum of thirty pounds sterling, for value received.

"JOHN DOWNEY, Kilmacat.
"ROBERT NEAZOR, 14 William Street.

"*Present*—JOHN BARRY.
"*Endorsement*—£20 paid on account.—27/10/'05—J. B."

William Q. Murphy, for the plaintiffs.

Patrick Kelly, for the defendant.

May 18.

KENNY, J. :—

In dealing with this special case we are at liberty, by the consent of the parties, to draw such inferences as the facts stated may warrant. These facts, as they appear in the case, may be very briefly stated. A tenant on the Caulfield estate in the County of Limerick, named John Downey, desired to purchase his holding under the Land Purchase Acts, and, with that object, entered into what I assume was the ordinary purchase agreement, pursuant to the Irish Land Act of 1903. It was signed on the 11th October, 1905, but was not lodged in the Land Commission until the 17th February, 1906; and up to the month of April, 1907, when the special case was stated, the lands in which Downey's holding was

included had not been declared "an estate." There is no doubt, however, that the matter of the sale is still pending in the Land Commission. When the tenant agreed to purchase, he owed two years' rent, one year of which was to be paid out of the purchase-money to the landlord, pursuant to sect. 24, sub-sect. 8, of the Act. As to the other year's arrears, amounting to £30, it was agreed between the plaintiffs, who were the agents of the estate, and the tenant that the former should pay that amount to the landlord, and should take from the tenant, and a surety, to be procured by him, a promissory note for the amount to be so paid. The defendant herein was named as surety; and in order to carry out the arrangement he and the tenant jointly and severally made their promissory note for £30, dated the 11th October, 1905, the same day as that of the purchase agreement, payable to the plaintiffs at one month's date. The plaintiffs on the next day, the 12th October, 1905, discounted the note; and on the 24th October, 1905, paid the £30 to the landlord. On the 27th October, 1905, before the note matured, the tenant made a payment on foot of it of £20, leaving £10 unpaid. The civil bill was brought by the plaintiffs against the defendant, the surety, for recovery of the sum of £10. The County Court Judge dismissed the civil bill, and the plaintiffs appealed. On the hearing of that appeal this special case was stated by my Lord Chief Justice, who asks us to say whether the plaintiffs are precluded from recovering by reason of the provisions of the Land Purchase Acts.

The section we have to deal with is the 35th section of the Land Law (Ireland) Act, 1896. In its first sub-section it provides that when an agreement for the purchase of a holding is made and is lodged with the Land Commission, the purchaser—that is, the tenant—shall, in the event of the sale being carried out, be discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including all rent and arrears existing at such date; but if the advance is refused, the agreement shall be void and the tenant shall be liable to pay rent and arrears as if the agreement had not been made. The sub-section concludes with a declaration that no proceeding in respect of the said rent and arrears existing at the date of the

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agreement shall be brought pending the carrying out of the sale. The object of the section is manifest. The landlord before consenting to sell might make such terms as he thought fit with the purchasing tenant as to payment or relinquishment of any arrears of rent; but if he failed to do so and the sale was carried out, such arrears became irrecoverable from the tenant. Pending the sale, no proceeding for recovery of them could be brought; but if the sale went off, the landlord was remitted to his original rights, and the arrears remained, and could be recovered as a debt due by the tenant. The arrears were not extinguished in *all* events, but the right to recover them, pending the carrying out of the sale, is suspended. If, therefore, the plaintiffs' claim in this civil bill is to be regarded as one for the recovery of the arrears of rent from the tenant, it is unmaintainable. If, on the other hand, it cannot be regarded as a claim for rent from the tenant, the plaintiffs are, in my judgment, entitled to a decree.

In the inferences to be drawn from the facts as stated in the case we should not diverge from what we may consider fair and legitimate conclusions. At the same time, individual opinion may differ as to the nature of these deductions. The landlord, or his agents in his interest, had a perfect right, if they could effectively do so, to keep alive the right to payment of the rent. There is nothing morally or legally wrong in doing so. If the right be kept alive by a device, the only question that can arise is whether what is called a device is a legal and effective expedient for its purpose. The transaction in the present case seems to me to be simply this. The tenant was unable to produce cash for the year's rent. The landlord, unless by his agents, does not appear in the matter at all. I will infer that it was known to the parties that if the landlord was to get that rent, some sort of arrangement must be made for either its immediate discharge or its conversion into another and different class of debt. I cannot on the facts as stated in the case draw any other inference hostile to the plaintiffs' claim. If I went further, it seems to me that I would be going in the face of those facts. For instance, it would, in my opinion, be wholly illegitimate for me to assume that there was no agreement that the plaintiffs should individually take on themselves the obligation of paying the landlord his rent. It is stated that they

did so. Again, am I to infer that this was all a juggle with the landlord's own money, and that the plaintiffs did not, out of their own pocket, pay the landlord the £30, and that the landlord is the real plaintiff in this case suing for what is really "rent"? The facts stated are, I consider, opposed to such inferences. The latter would involve a still further conclusion. The plaintiffs are the holders of the note, and, for the purpose of suing on it, should be deemed to have taken it up from the bank or person with whom they discounted it. Am I to conclude that it was the landlord's and not the agents' money that retired the note? With the exception of the statement in the second paragraph of the case, that the agreement with the tenant was come to by the plaintiffs as agents, there is no indication that throughout the case the "landlord" and "agents" are convertible terms. Being of opinion that that is so, it seems to me that the transaction was a very ordinary one—that the landlord's rent has been actually paid—and that, whether the agreement for purchase be carried out or not, the tenant's rent, to the extent of the £30 stated to have been paid by the plaintiffs, is discharged.

I shall, however, for the purpose of argument assume that the landlord and agents are one, and that the agents occupied no independent position in this transaction. The argument will then amount to this. The tenant secures the £30 by a promissory note of himself and a third party payable to the landlord at a date subsequent to the agreement for sale. *Prima facie* I agree that the right to the rent *qua* rent is not thereby extinguished: *Davis* v. *Gyde* (1); inasmuch as rent is a higher class of debt than that arising on a negotiable security. But in every case there may be a question whether the note was accepted in satisfaction of the rent. We are asked to say whether the plaintiffs are precluded from recovering by reason of the Act of 1896. The Act, as it seems to me, can be a bar only if the thing sought to be recovered is rent, and if the person sought to be made liable is the tenant. This to my mind is clear so far as the first portion of the sub-section is concerned; and, in my opinion, the same interpretation must be applied to the latter part, which deals with

(1) 2 Ad. & Ell. 623.

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proceedings in respect of the rent, pending the carrying out of the sale. Assuming the plaintiffs to be the landlord, why are they not entitled under the circumstances to recover the amount due on a note given to them by a third party, although given to secure payment of rent? It may be that as between the landlord and tenant the former, but for the Act of Parliament, could still sue for the amount as rent; but I fail to see how the landlord's rights against the third party are affected. If they are, that result must be attained by the defendant establishing that "rent" is sued for, and that he is the "tenant," or that there is no consideration for the note. The Act does not say that anyone but the "purchaser"—that is, the "tenant"—is to be discharged. In *O'Shea* v. *Walsh* (1) the section involved was the 3rd section of the Land Purchase Act of 1888, somewhat similar to the 35th section of the Act of 1896, and the action was brought against a person in the position of a surety who had signed the note to secure the rent; and, in holding that the plaintiff was entitled to recover, Holmes, J., is reported to have said that the transaction was one in which the landlord said to the tenant: "Pay me cash or give me security, and I will release you"; and that it was the same as if the tenant had borrowed the money from the defendant, and paid it over to the landlord. It may be that the latter sentence contains too strong a statement of the case, having regard to *Davis* v. *Gyde* (2) and *Davidson* v. *Allen* (3), unless the learned Judge considered, as apparently he did, that the arrangement which eventuated in the giving of the note amounted on the facts to a complete release of the arrears of rent. Whether it did or did not, I fail to see why the third party cannot be answerable in respect of the contract he entered into, whether the plaintiff in the action be landlord or agent. It was said that there was no consideration for the note, or that the consideration had failed. I think there was ample consideration so far as the defendant was concerned, and that it has not failed. In the absence of the 35th section it could not be contended otherwise. The rent is not extinguished by the section. It is possible it may not be extinguished at all, though the right to recover it as rent is temporarily suspended. The consideration for the note still remains.

(1) 29 Ir. L. T. R. 95. (2) 2 Ad. & Ell. 623. (3) 20 L. R. Ir. 16.

The result, in my judgment, is that, whether we take the facts literally as stated in the case, or treat the landlord and agent as identical persons, the defendant is liable, and the dismiss of the County Court Judge ought to be reversed.

GIBSON, J.:—

It is admitted that the effect of signing the purchase-agreement (which was duly lodged) was that the landlord's right to payment of all arrears then due was suspended; consequently, if he had taken the note (discounted on the following day) in his own name, he could not have sued on such note, unless and until the purchase fell through, the only consideration for the note being the arrears, otherwise the statute could be evaded by taking a bill in every case. The difficulty I have felt in dealing with the case is as to the exact import of the question put. This Court can only answer questions of pure law; they cannot draw inferences of fact, or decide the case on its merits. Judge Adams dismissed the case. I think the question means, on the facts stated, must the plaintiffs be entitled to a decree? On such facts was the dismiss necessarily wrong? There may be a lawful evasion of a statute if a person keeps outside its provisions: *Macbeth* v. *Ashley* (1); *Payne* v. *The King* (2). The case cannot be construed as meaning that the plaintiffs acted without intent to evade. I think the question is, do the facts stated exclude the inference of such an intent to evade as would be illegal? I interpret the case in the same way as the Court did in *The Midleton Guardians* v. *O'Donnell* (3). The judgment of Holmes, J., puts the point very clearly. Otherwise what would be reserved for our decision would be a question of fact, not one of pure law. The parties have consented to the Court drawing inferences of fact, but that cannot affect the original intention of the case as and when it was stated. My Lord contemplated the point as being whether the facts excluded the inference of illegal evasion on which Judge Adams founded his decision—whether there was evidence to justify the dismiss. The plaintiffs were the *alter ego* of the landlord; had full power to make the sale

(1) L. R. 2 H. L. (Sc.), at p. 359. (2) [1902] A. C. 552.
(3) [1896] 2 I. R. at pp. 234, 239.

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and arrange the terms; and as one of such terms, agreed that they would pay one year's arrears, taking a promissory note at one month in their own names. They might have insisted on payment in each case before signature; they did not do so, and the arrear was in existence, and unsatisfied when the contract was executed. It is not stated that the agents had any personal interest in the tenant which would induce them to lend him the amount. The note was discounted next day, and the proceeds paid to the landlord. What became of the note, or whether the plaintiffs have been allowed credit by the landlord in their accounts, or whether they have been required to pay, or have paid the Bank out of their own proper money is not stated. The case is much the same as if the landlord had made the arrangement in person. The plaintiffs now sue on the note as holders.

The note did not extinguish the arrear: *Davis* v. *Gyde* (1); *Davidson* v. *Allen* (2). It is doubtful whether it suspended the right of action. The landlord was not payee, and the case does not state that the note was accepted as payment of the arrear. At the moment the contract was signed the arrear was due and payable, and the execution of the contract, followed by lodgment, made such arrear irrecoverable, unless the sale went off. If the note had been in the landlord's name, the consideration would have failed.

I think the above facts do not conclusively prove that as a matter of law the plaintiffs are entitled to recover. The Judge drew the inference that the transaction was a contrivance to get out of section 35 of the Act of 1896; and that it was an illegal evasion of the provisions of that enactment. Counsel says that it is exactly the same as if the landlord negotiated directly with the tenant, and said to the tenant, the agent standing by—"The arrear will be settled for you by the agent, who will get your note in his own name, and discount it." In making the entire bargain the agent acted for and was the landlord. The transaction was indivisible. I think that the inference drawn by the Judge was competent, and if it was, the dismiss would not be in point of law

(1) 2 Ad. & Ell. 623.

(2) 20 L. R. Ir. 16, at pp. 25, 26.

erroneous. In other words, the facts found in the case would not entitle the plaintiffs to a direction. That being so, the question put to us must be answered in the negative. The point of the case is, whether, no matter what the intent, have the plaintiffs succeeded in keeping outside of the provisions of section 35?

O'Shea v. *Walsh* (1) was quite different. There the bargain as to the arrear was antecedent to and detached from the purchase-agreement, and the tenant was not made a party. Here the facts justify an inference that the arrangement, which was part of the purchase-agreement, was a device to evade the Act, and that no real *bona fide* loan by the agents was contemplated.

I cannot construe the case as excluding the inference of illegal intent, for that is the very point which my Lord intended to reserve for our decision—that is, whether the form adopted by the plaintiffs took the case out of the statute as a matter of law.

LORD O'BRIEN, L.C.J. :—

I entirely agree with my brother Gibson. The result of the argument which has taken place—the difference of opinion that exists between the members of the Court—shows that I was abundantly justified in stating this case. The County Court Judge, Mr. Adams, plainly thought that what had occurred—that the agreement that had been entered into—was intended to be, as in my opinion it plainly was, a contrivance to frustrate the Act of Parliament. I do not for a moment say that there was any moral culpability, or that the contrivance was a dishonest contrivance. No more respectable agent exists anywhere than Mr. Nash; but what was contrived was clearly a method to evade the Act of Parliament. I am quite sure that the learned County Court Judge would be, as I would be, the very first to disclaim any intention of imputing any moral blame to Mr. Nash; but the question remains, can the Act of Parliament be evaded by such a contrivance as this, to defeat its object? Mr. Nash is a highly honourable man, but he is in no way deficient in ability. What took place was part and parcel of the one transaction, in which the agent acted as the *alter ego* of the landlord. In my

(1) 29 Ir. L. T. R. 95.

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Lord O'Brien, L.C.J.

opinion, independent of intention to defeat the Act of Parliament, which plainly existed, this transaction was *ex facie* and directly calculated to defeat the Act. The transaction here was no more or less than an attempt to get in moneys numbered the identical amount of the rent, which by the name of rent was not enforceable. The agent was to receive with one hand and to pay with the other. What else was contrived than this, that the rent should be paid in substance and reality by the tenant under the guise of an independent transaction between him and the agent, who in truth and fact was nothing else than the *alter ego* of the landlord? What was contrived was merely a method of defeating the Act of Parliament; it did defeat the Act of Parliament, and was in its essence unlawful. What we have here was not a lawful means of keeping outside the Act of Parliament. It was a frustration of its provisions.

Solicitor for the plaintiffs: *Ralph Nash.*
Solicitor for defendant: *P. E. O'Donnell.*

J. L.

Appeal. 1908.

Jan. 13.

HAIGH *v.* PURCELL (1).

(1907. No. 14,256.)

Practice—Specially indorsed writ—Amendment of writ without leave—Motion for judgment—R. S. C., I. (1905, 22*nd February*), *Ord. III., R.* 6; *Ord. XIV., R.* 1; *Ord. XXVIII., Rr.* 2, 4, 5.

Where a plaintiff, by amendment under Order XXVIII., Rule 2, converts an ordinary into a specially indorsed writ, he cannot obtain final judgment upon the amended writ, under Order XIV., Rule 1, without service of the amended writ upon the defendant; nor can he obtain such judgment to the prejudice of the defendant's rights under Order XXVIII., Rules 4, 5.

Guinness v. *Caraher* ([1900] 2 I. R. 505) followed.

Roberts v. *Plant* ([1895] 1 Q. B. 597) considered.

APPEAL by the defendant from an order of the Right Hon. Mr. Justice Kenny, dated the 21st December, 1907, whereby on

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

the hearing of an application under Order XIV., Rule 1, the plaintiff was granted liberty to enter final judgment for the amount indorsed on the writ.

The writ served upon the defendant was headed "Statement of Claim," and was signed by the plaintiff's solicitor, the indorsement in the body of the writ being as follows :—

> The plaintiff's claim is against the defendant as maker of a promissory note for £54, dated 3rd May, 1907, and payable to Herbert Malley, solicitor, or order, at 18 Nassau Street, Dublin, three months after date, which said note was duly presented for payment and dishonoured.
>
> Particulars—Principal, £54.

The defendant having entered an appearance to this writ, the plaintiff, on the 16th December, 1907, served upon the defendant a notice of motion for liberty to enter final judgment under Order XIV., Rule 1, to be heard on the 21st December, 1907.

On the morning of the 21st December the plaintiff amended the writ on the file of the Court without leave under Order XXVIII., Rule 2, by adding to the statement of claim indorsed on the writ an averment that the promissory note had been duly indorsed by the said Herbert Malley to the plaintiff, thereby for the first time constituting the writ a specially indorsed one. The amended writ was never served upon the defendant, but notice of the amendment was served upon the defendant's solicitor on the same morning, and immediately prior to the hearing of the motion for judgment. The affidavit filed by the plaintiff in support of the motion contained an averment that the promissory note had been duly indorsed to the plaintiff.

The learned Judge was referred by the plaintiff's counsel to *Roberts* v. *Plant* (1), on the authority of which case he made the order now appealed against.

Donaldson, for the appellants :—

Roberts v. *Plant* (1) decided that when by amendment there is a good special indorsement at the time of adjudication leave to enter judgment may be given. The amendment there, however,

(1) [1895] 1 Q. B. 597.

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was of a mere informality, and not one of substance as here. This Court, moreover, in *Guinness* v. *Caraher* (1) did not follow *Roberts* v. *Plant* (2), and decided that it was not competent for a plaintiff having issued and served an ordinary writ to change it by amendment at the time of moving for judgment into a specially indorsed writ. As in *Guinness* v. *Caraher* (1) the defendant was not shown by any averment in the writ to have had anything to do with the lands sought to be recovered in the action, so in the present case the plaintiff was not shown by the writ as served to have had anything to do with the promissory note sued on. The writ was therefore not specially indorsed: *Northern Bank* v. *Bailey* (3); *Synge* v. *Johnstone* (4). As only notice of the amendment was served on the defendant, judgment has been entered on a writ which was never served. Such judgment would afford no defence to the defendant if sued on the note in another action. By the course adopted the defendant has been deprived of his rights under Order XXVIII., Rules 4 and 5. If the writ had been properly indorsed under Order III., Rule 6, at the beginning, the defendant might have elected not to enter an appearance; in which case he would not have been burdened with the costs of the motion.

Molyneux Barton, for the plaintiff: —

It is admitted that the defendant has no defence to the action on the merits, and he now seeks to defeat the plaintiff's motion by a mere technicality. No doubt the writ as served did not contain a proper special indorsement, but the defect was cured by the amendment, which was regularly made under Order XXVIII., Rule 2. *Roberts* v. *Plant* (2) clearly decides that when there is a good special indorsement at the time of adjudication the plaintiff is entitled to judgment. *Guinness* v. *Caraher* (1) is distinguishable, as there, so far as appeared from the averments in the writ, the plaintiff brought in a complete stranger to the lands.

(1) [1900] 2 I. R. 505.
(2) [1895] 1 Q. B. 597.
(3) [1894] 2 I. R. 18.
(4) 2 New Ir. Jur. 64.

THE LORD CHANCELLOR:—

This case involves an important question of practice, but we think that we are bound by *Guinness* v. *Caraher* (1) which was a decision of this Court, and which in substance rules the present case. No doubt, under Order XXVIII., Rule 2, a plaintiff may, without leave, amend his statement of claim, whether indorsed on the writ or not, within the time limited by the rule, but I do not think that the order appealed against was consistent with Rules 4 and 5 of Order XXVIII. Under Rule 4 the defendant should have been allowed eight days after delivery of the amended pleading to consider his position, and, if so advised, to apply to the Court to disallow the amendment, and, again, Rule 5 provides for the delivery by the opposite party of a pleading to such an amended pleading as this. Here the defendant has been entirely deprived of his rights under these two rules. In point of fact no amended statement of claim was ever served upon him at all: what was done was that on the very morning of the motion for final judgment the plaintiff amended the statement of claim upon the file of the Court, and served notice of having done so upon the defendant. This was done practically cotemporaneously with the motion, and in such a summary manner that Mr. Donaldson had no opportunity of bringing before Mr. Justice Kenny the decision of this Court in *Guinness* v. *Caraher* (1).

The learned Judge was referred by the plaintiff's counsel to *Roberts* v. *Plant* (2), but not to *Guinness* v. *Caraher* (1); and if the latter case had been before him, he would probably not have acceded to the application. We must follow our former decision, which we think to be the only one consistent with the rules.

We will allow no costs in the Court below, but we will give the defendant the costs of this appeal.

FITZ GIBBON, L.J.:—

I am not fond of technicalities; but the decision of this Court in *Guinness* v. *Caraher* (1) appears to me to be right upon the Rules, and not merely technical.

The decision under review amounts to this, that a plaintiff can

(1) [1900] 2 I. R. 505. (2) [1895] 1 Q. B. 597.

Appeal. 1908. HAIGH v. PURCELL. Fitz Gibbon, L.J.

mark final judgment on a specially indorsed writ which was never served, because the writ served here was obviously not specially indorsed, under either the Irish or the English Rules or practice. An amendment of the writ on the file turned it into a specially indorsed writ, for the first time, on the morning of the motion for final judgment. The amended writ was neither served nor delivered, no copy of it was made, and the defendant got nothing but a notice that the amendment had been made on the file. What was done not merely deprived the defendant of the time and opportunity of dealing with the amendment given by Order XXVIII., Rules 4 and 5, but it also involved the irregularity of marking judgment on a document never served. In every way I think that our practice is right; but whether right or wrong it has been well considered, because *Roberts* v. *Plant* (1) was before this Court in *Guinness* v. *Caraher* (2). As Mr. Justice Kenny was referred by the plaintiff's counsel to *Roberts* v. *Plant* (1), but not to the later Irish decision, I should have given the defendant his costs both in the Court below and here. On the main question, I entirely agree that the appeal must be allowed,

HOLMES, L.J., concurred.

Solicitor for the appellant; *Alfred Henry.*
Solicitor for the respondent: *Herbert Malley.*

R. ST. J. C.

(1) [1895] 1 Q. B. 597. (2) [1900] 2 I. R. 505.

ANDREW CREMIN, APPLICANT; THE LORD MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF CORK, DEFENDANTS (1).

Appeal. 1908. Jan. 17.

Local Government—Peace officer—Compensation for maiming—Appeal from County Court—Case stated by Judge of Assize—Form of question submitted—Inference of fact—Question of law.

On the hearing of an appeal against a decree of a County Court Judge, awarding a constable compensation for maiming, under sect. 106 of 6 & 7 Wm. 4, c. 116, as amended by the Local Government (Adaptation of Irish Enactments) Order, 1899, the Judge of Assize held—(1) That, as a matter of fact, the applicant, who had been stoned by a riotous crowd, certain members of which he had previously brought to justice, was attacked by reason of his action on the occasion in question towards one of the crowd, whom he removed to his home on account of disorderly conduct; (2) that this man was not, in fact, arrested by the applicant; and (3) that in point of law the applicant was not, on the particular occasion, bringing a disturber of the public peace to justice; and he reversed the decree.

The Judge, however, stated a case for the Court of Appeal, as to whether, "*on the evidence*," the applicant was entitled to compensation :—

Held, by the Court of Appeal, that, on the form of the question submitted, the finding of the Judge of Assize could not be sustained; and that the applicant was entitled to compensation.

CASE STATED by the Right Hon. Mr. Justice Gibson, at the Cork Summer Assizes, 1907, on the hearing of an appeal from a decision of the Recorder of Cork, awarding the applicant, a constable of police, £150 compensation for injuries caused by maiming.

The learned Judge stated that the facts were not in dispute, and appended to the case stated a note of the evidence, which may be briefly summarized as follows :—

The applicant was, in the years 1905–7, stationed at Cork,

(1) Before THE LORD CHANCELLOR and FITZ GIBBON and HOLMES, L.JJ.

Appeal. 1908. CREMIN v. LORD MAYOR, &c., OF CORK.

and had on frequent occasions been detailed for duty in a district comprising the corner of Exchange-street, which was a disturbed locality. On the 24th December, 1905, he found a man named Clinton drunk and disorderly at this corner, with other members of a certain gang of corner-boys; and, at the prosecution of the applicant, Clinton was sentenced to a month's imprisonment with hard labour. On the 29th March, 1907, the applicant was assaulted by one Horgan, a member of the gang, close to the same corner, in consequence of which Horgan, at the prosecution of the applicant, was also sentenced to a month's imprisonment with hard labour. Horgan was still in gaol on the night of the 20th April, when the injuries in question in this case were sustained. On that night the applicant came on duty to the corner of Exchange-street, where he found a noisy crowd of persons, members of the same gang, who were exchanging angry words, and in a fighting attitude. The applicant knew the appearance of them all, and subsequently ascertained their names. Two of them had been present on the occasion when Clinton was arrested, and had then urged Clinton to assault the applicant, who had frequently seen all these men together at the corner in question, and had been compelled to "move them on," owing to their conduct.

On the present occasion he observed that one of them, Coleman by name, was drunk and disorderly; whereupon he requested another of them to take Coleman home—a request which led to his being challenged by the crowd as to his right to interfere with them. The applicant not thinking it safe to arrest Coleman, owing to the demeanour of the crowd, caused the latter to "move" on, and himself passed on for a few yards. The crowd then began to shout loudly, defying the applicant, and challenging him in abusive language to come back and "do his best." He then faced the crowd, and, noticing that Coleman was staggering about the street, he again requested one of the crowd to bring him home; to this no reply was given beyond the shouting and jeering of the crowd, whereupon the applicant took Coleman into his custody, and, as he was permitted to do under the regulations of the force, brought him to his home a few yards away, and left him there. While doing so, a stone was thrown at him, but did

not hit him. Having left Coleman at his home, the applicant returned to the crowd, when he found that the gas-lamp at the corner had in the meantime been extinguished; and he was met with a shower of stones thrown by the crowd, and severely injured in the face.

It was also deposed by a police sergeant stationed at Shandon-street, that a number of complaints had been made to him on account of the "officiousness" of the applicant at the corner in question, and also that he was known in the district as "the Watergrasshill murderer," although he was not present at, and was in no way connected with, the Watergrasshill incident.

The learned Judge reported in the case stated, that after reserving judgment, he decided that the decree below should be reversed and the application dismissed without costs, holding, as a matter of fact, "that the attack on Cremin arose from his action with regard to Coleman; that Coleman was not arrested; and that in point of law, Cremin was not bringing Coleman as a disturber of the public peace to justice within the meaning of section 106 of the statute 6 & 7 Wm. 4, c. 116."

The questions left for the consideration of the Court of Appeal were:—

(1) Upon the evidence, was Cremin entitled to compensation, under section 106 of the Grand Jury Act?

(2) Should the decree below be reversed or affirmed?

Conner, *K.C.*, and *Hon. Cecil Atkinson*, for the applicant, contended that on the evidence, the case came within the provisions of section 106; and that the maiming was brought about, not by reason of the arrest of Coleman, but by the unpopularity of the applicant on account of his former exertions as a peace-officer to bring disturbers of the public peace to justice.

[They referred to and distinguished: *Murphy* v. *Cork County Council* (1) and *Power* v. *Tipperary County Council* (2)].

(1) [1903] 2 I. R. 445. (2) 4 New Ir. Jur. 159.

Appeal. 1908.

CREMIN v. LORD MAYOR, &c., OF CORK.

Moriarty, K.C., Lynch, K.C., and *Reardon,* for the respondents :—

The only question for this Court is, whether there is any evidence to sustain the finding of fact by Mr. Justice Gibson, that the attack on the applicant arose from his action with regard to Coleman; there is ample evidence to support that finding, which cannot be reviewed by this Court. The case made in the Court below by the applicant himself was, in the alternative, that there had been an actual arrest of Coleman, in an endeavour to bring him to justice as a disturber of the peace, and that the applicant was therefore entitled to compensation.

THE LORD CHANCELLOR :—

I think it would be an unfortunate thing if we were prevented from arriving at a conclusion whether, as a matter of law, the applicant is entitled to compensation. If Mr. Justice Gibson intended to find, and has found, as a question of fact, that it was the Coleman incident alone that occasioned the injuries sustained by the applicant, then, in my opinion, there is no evidence to sustain that finding. Therefore we will treat the case, and ought so to do, upon the merits; and it is a singular thing that neither Mr. Moriarty nor Mr. Lynch has addressed to us any argument on the merits of the case; but they confined themselves to the contention that there was an actual finding of fact by Mr. Justice Gibson which it was not competent for us to review.

The question for us is, whether, on the evidence, the constable Cremin was, in the words of the statute, injured on account of his exertions as a peace-officer to bring disturbers of the peace to justice. We are all of opinion that it was in consequence of Cremin's previous exertions to bring disturbers to justice that the injuries were sustained; and, therefore, the principle of the decision of this Court in *Murphy's Case*(1), although the application was there refused, applies.

It must be remembered that this is a branch of the law relating to malicious injuries; and, in my judgment, the malice that undoubtedly existed towards Cremin, owing to his exertions against this gang of corner-boys, was the cause which led to the

(1) [1903] 2 I. R. 445.

injuries being inflicted on him, and the Coleman incident was merely the occasion—the opportunity that arose—for exercising that malice.

The facts are undisputed. Cremin was an active constable, who, on the 24th December, 1905, was employed at this corner, which had a bad reputation, and was generally haunted by corner-boys. Healy, who took part in other transactions, was there, with others, and one Clinton was, through the exertions of Cremin, prosecuted and convicted. These corner-boys were all "comrades," and, no doubt, one of the strongest bonds of union between them was their antagonism towards the constable who had brought one of them to justice. Then, on the 29th March, 1907, another of this gang, Horgan by name, was prosecuted by Cremin for assaulting him, and Horgan also was sentenced to a month's imprisonment for that offence.

On the night in question, the 20th April, 1907, which it must be remembered was only three weeks after the incident of the 29th March, we find a number of this gang at the same corner, Healy active as before, with a number of others, including Coleman, who was drunk and disorderly. Before Cremin took Coleman into his charge at all we find him addressed by Healy in terms which I need not repeat, perhaps not peculiar to Cork, and shouted at as "the Watergrasshill murderer," although Cremin was not connected with the affair at Watergrasshill in any way. We have it then that before Coleman was interfered with at all, Cremin was spoken to and threatened in terms which showed extreme ill-will—ill-will caused no doubt by his former action in regard to Clinton and Horgan, the latter of whom was still in gaol, and by the presence of Healy, the comrade of Clinton and Horgan. Cremin then asked one of the crowd to bring Coleman, who was drunk and staggering, home, whereupon the crowd cheered and shouted. Cremin then himself, kindly, and as an act of charity, took Coleman to his home, and left him there. There was a stone thrown at Cremin before he got Coleman to his home, which was only a few yards away; and when Cremin returned, he was severely injured by the stone-throwing of the same mob round the corner, which had already insulted and threatened him before the Coleman incident took place.

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These facts are not in dispute—they are admitted. Is it not abundantly clear that there was malice against Cremin for his activity against these corner-boys, whose comrade was actually in gaol at the time owing to his exertions, and who resented his interference with them—which malice, and not the arrest of Coleman, led to the attack?

It seems to me that there is no evidence upon which a Judge could reasonably come to the conclusion that it was the arrest of Coleman that brought about the attack on Cremin, but that it was the previous exertions of Cremin to bring these malefactors to justice. That is evidenced by what occurred before Coleman was arrested at all. Under these circumstances we are of opinion that the decree of the Recorder should be affirmed, and the case remitted to Mr. Justice Gibson, who will allow £150 compensation, that amount not having been challenged. We will measure the applicant's costs of this appeal at the sum of ten guineas.

FITZGIBBON, L.J.:—

I must say that, if the inference from the evidence in this case were not what we hold it to be, the result would appear to me to prevent peace-officers, in almost any case, from obtaining the benefit of the statute, which expressly mentions them as beneficiaries, and which was intended to protect them by compensation.

To Mr. Moriarty's point that we are confined to a question of law, I answer that, although there is no jurisdiction to submit anything but a question of law on the case stated here, we have in this Court, in Registration cases, and in Workmen's Compensation cases, always treated as a question of law the question whether there is sufficient evidence to sustain a particular finding of fact. Furthermore, in the form in which Gibson, J., has stated the question as one "upon the evidence," I hold myself free to consider the propriety of the inference of fact which he has drawn as a "question of law." In Registration cases, both in England and here, it is the now inveterate practice to state cases which raise what are really only questions of fact in disguise. The case sets out all the evidence; the Revising Barrister draws a conclusion of fact, and asks the Court of Appeal to say whether, "on the

evidence," that conclusion is right. We ought to be slow to refuse to answer questions left in that form, though what we really decide is that the preponderance of evidence is so great, on one side or the other, that there ought not to be any reasonable doubt as to the conclusion.

In Workmen's Compensation cases the words of the Act are stronger, because they are negative and prohibitive, as well as positive and directory; but even in those cases it has been found impossible to entirely exclude the consideration of the preponderance of evidence on cases stated. We have already twice (1) answered questions left to us—as here—"upon the evidence": in each of them whether the conclusion of the Judge who stated the case was right or wrong depended on the preponderance of evidence; here, in my opinion, the evidence is all on one side.

If the motive of the mob—the "special malice" against the constable—was confined to what occurred with regard to Coleman, the occurrence is incredible; it might have been otherwise if the constable had been injured while he had Coleman in his hands; but his own account, which is corroborated by every other circumstance and witness in the case, shows clearly the several stages of the incident. He first had his attention drawn to a drunken assembly, of which Coleman was one of the worst members; he ordered the men to "move on," and not thinking it safe to arrest Coleman, he walked away from them. Then he was challenged from behind to "come back and do his worst": not being a man easily perturbed, he faced the mob, and charged Coleman with being drunk and disorderly. He did not arrest him, but he told one of the others to take him home. This not being done, the constable himself took Coleman home. To the extent of putting him under manual control he arrested him, not for the purpose of taking him to the lock-up, but of seeing him safely home, as the regulations permitted him to do, and he put him in charge of Mrs. Stack, presumably a relative or friend, in the house in which he lived, some twelve yards away. One stone at least had been thrown while Cremin was on the way to Coleman's

(1) *Murphy* v. *Cork County Council* ([1903] 2 I. R. 445); *Power* v. *Tipperary County Council* (4 New Ir. Jur. 159).

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house, but it did no harm; and, after leaving Coleman at home, the constable went back to see whether he could make any one amenable for having thrown it. He found that this disorderly mob had in the meantime been preparing for mischief; they had put out the gas; the place was in darkness. When he came near them he received a shower of stones, one of which struck him in the face and injured him, and the assailants at once ran away. It is not a reasonable inference of fact that the constable was injured on account of his having left the drunken man in his own house. After he done that, he was deliberately attacked and injured on account of the ill-feeling which, both before and after, was manifested by the acts and expressions of the crowd itself, and which is clearly connected by evidence with his activity and success in dealing with disturbers of the peace on previous occasions.

There is affirmative proof, by name and identification, that the crowd on that night included a number—some half dozen—of comrades companions and associates of Horgan, who was in gaol at the time, and one of them was Clinton, who had been in gaol before—both under convictions obtained by Cremin's successful exertions to bring them to justice as offenders against the peace.

I draw the conclusion that, knowing Cremin well, and having experience of the result of his exertions against themselves and their friends, all equally disturbers of the peace, they took this occasion, when they had got him among them, of venting their malice upon him; it seems to be repugnant to human nature and to the evidence to hold that he was stoned in resentment for his having brought Coleman home, and handed him over to Mrs. Stack, instead of taking him to the bridewell.

In my judgment the applicant has brought himself within the very words of section 106, and the questions left to us ought to be answered accordingly.

HOLMES, L.J., concurred.

Solicitors for the applicant: *Wynne & Wynne.*
Solicitor for the respondents: *B. C. Galvin.*

R. ST. J. C.

QUINN *v.* PRATT AND ANOTHER (1).

(1907. No. 1028.)

K. B. Div.
1907.
June 18, 19.

Justices—Search-warrant—Delivery of possession—Trover and conversion—Court of Summary Jurisdiction—Coram non judice—*Possession*—Custodia legis—60 & 61 *Vict. c.* 30, *s.* 1—12 *Vict. c.* 16, *s.* 2.

In the course of a family dispute as to the ownership of a farm, Q. and others, who were living in the house on the farm, reaped and stored in a room in the house a quantity of barley which had been sown by B., whereupon B. swore an information to the effect that Q. and the others had stolen the barley, on which Captain S., a Justice, issued a search-warrant. Upon the barley being found in the house, Q. and the others were arrested by the police, and brought before Captain S. and Major P., Justices, sitting in the day-room of a police barrack, and were returned for trial. Afterwards, in the absence of Q. and the others, the two Justices, purporting to act under 60 & 61 Vict. c. 30, s. 1, made an order to the police, who had taken possession of the barley, to deliver it to B., which was done:—

Held, that the two Justices, sitting in the day-room of the police barrack, were not a "Court of Summary Jurisdiction" for the purposes of this section; the proceeding, in which the order to deliver the barley was made, was, therefore, *coram non judice*: and their act in making the order was one within 12 Vict. c. 16, s. 2, which entitled Q. to maintain an action against the Justices without proof of malice.

Held, also, that there was no jurisdiction to make the order without the parties interested being present or summoned to attend.

Held, also, that the seizure of the barley under the search-warrant, and the *custodia legis* thereby established, did not deprive Q. of a possession of the barley sufficient to entitle him to maintain an action of trover against the Justices.

MOTIONS by the plaintiff and defendants, respectively, to have judgment entered for them on the findings of the jury. The defendants, Major James C. Pratt and Captain W. J. Stoyte, two Justices of the county of Cork, were sued for damages arising from the making of an order in assumed exercise of jurisdiction, under the statute 60 & 61 Vict. c. 30, s. 1, by which order it was authorized

(1) Before PALLES, C.B., and ANDREWS, J.

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that certain barley, claimed in this action by the plaintiff to be his property, should be delivered to John F. Bourke. Michael Quinn was named in the writ as sole plaintiff, but, by leave of the Judge at the trial, the pleadings were amended by averring that Quinn sued on behalf of his wife, Margaret Quinn, and the other children (including James and Lawrence) of P. W. Mansfield, deceased, all minors under the age of twenty-one years. P. W. Mansfield died in the year 1895, possessed, amongst other property, of the farm of Ballinaboley, which he held under a lease dated 1815, converted into a fee-farm grant in the year 1864. By his will he gave to his wife "all my worldly goods, to manage for herself and children to the best of her ability." Mrs. Mansfield, after her husband's death, went to America with her eldest son Garrett, and died there. After she left, the young Mansfields went to reside at Kilbrittain with John F. Bourke, a retired sergeant of the Royal Irish Constabulary, and an uncle by marriage of the children. Bourke managed the farm of Ballinaboley for them, and applied the proceeds towards their maintenance. In the year 1902 the lands were put up for sale in a mortgagee's suit in the Court of Chancery. It was alleged that intending purchasers were put off bidding by Bourke asserting that he was buying for the widow and the orphans; and the lands were ultimately knocked down to him at the price of £570. After the purchase by Bourke, which was alleged to have been effected partly with the proceeds of the working of the farm itself, matters went on as before: the children residing with Bourke, who managed the farm and provided them with support. In 1904 Margaret Mansfield married Michael Quinn. Quinn, his wife, and one of the Mansfield boys went to live in the house on the Ballinaboley farm, which had been hitherto unoccupied. Bourke, with whom the other children continued to reside, brought a civil-bill ejectment against Quinn and the others in respect of the house and the plot of ground adjoining; but the proceedings were dismissed, and the dismiss was affirmed on appeal by the Judge of Assize. Quinn, his wife, and young Mansfield were then served with a summons for forcible entry on the lands, which came before the magistrates at Kinsale (of whom the defendants were two) on the 28th July, 1906. The dismiss in the ejectment was produced, and it was stated to the

magistrates that Quinn and the Mansfield children claimed title to the lands; but the magistrates thought that the dismiss related solely to the house and the adjoining plot, and held that they could not go behind Bourke's conveyance from the Court of Chancery and his four years' occupation. Accordingly, Quinn, his wife, and young Mansfield were sent for trial, but were liberated on bail. When the barley which Bourke had sown on the lands in the early part of the year ripened, Quinn, his wife, and two of the Mansfield boys (James and Lawrence) reaped it. Bourke tried to prevent them, but the neighbours helped them to thresh it, and it was stored in a room of the dwellinghouse. On the 14th September, 1906, Bourke swore an information before the defendant, Captain Stoyte, upon which Captain Stoyte granted a search-warrant for the barley. At 5.30 p.m. on the same day the police arrived at the house with the search-warrant. They went to the room where the barley was stored, and afterwards arrested Mrs. Quinn with her baby and her two brothers, conveying them in custody to Kinsale, where they arrived at 10.30 p.m. Quinn was away when the police visited the house, and did not reach home until midnight, when he discovered that all the inhabitants of the house had been taken in custody to Kinsale. He started at once, and at 3.30 a.m. on the 15th September reached the police barrack, Kinsale, where he found his wife and the others in custody in the day-room. He was forthwith taken into custody, and charged with the others with the larceny of the barley. At 11 a.m. the defendants, Major Pratt and Captain Stoyte, attended at the police barrack, whereupon depositions were taken in the presence of the four prisoners, and the two magistrates adjudicated that all four should be returned for trial. At first bail was refused, but it was afterwards allowed. The two magistrates then made an order to deliver the barley to Bourke, in alleged pursuance of 60 & 61 Vict. c. 30, s. 1. Before Quinn and his friends returned to the house Bourke and the police had been there. Bourke had placed the barley in sacks and carried it away. The magistrates' order to deliver the barley to Bourke was quashed by order of the King's Bench Division on 1st November, 1906. The plaintiffs alleged that this order was made without, and in excess of, jurisdiction, and that it was issued maliciously and without reasonable and probable

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cause. The defendants denied altogether that they were actuated by any malice, or desire to aid Bourke in the civil proceedings pending in reference to the ownership of the land. They stated that before issuing the order they studied the Act, and considering that Bourke, who planted the barley, was the owner of it, and that the plaintiffs were stealing it, they made the order in the exercise of their discretion.

The case was tried before Johnson, J., and a common jury at the March Assizes, 1907. It was stated at the trial that another action relating to the ownership of the land was pending in the King's Bench Division, in which Bourke was plaintiff and the Mansfields and the Quinns defendants. It had been tried before a Judge and jury, and stood for argument and judgment.

The following were the questions left to the jury, and their answers :—

1. Was the barley the property of the plaintiff? Yes; acting for the family.

2. Was the barley in possession of the plaintiff when the order of the 15th September, 1906, was made? Yes.

3. Was the order of the 15th September, 1906, made by defendants? Yes.

4. Was the order issued maliciously? Not answered.

5. Did defendants issue said order, and do the acts complained of, to assist Bourke to establish civil claims by him against plaintiff and Mansfields, and not *bona fide* in exercise of any jurisdiction vested or believed in by defendants? Not answered.

6. At the time of the making of the order did the defendants know that the title of the lands was *bona fide* in dispute? Yes.

7. Was the application of Bourke for the delivery to him of the barley made, heard, and disposed of in the absence of the plaintiff? Yes.

8. Was the barley taken from the plaintiff and given to Bourke pursuant to the order of the defendants? Yes.

9. Damages? £80.

The learned Judge refrained from giving judgment on the findings, leaving both parties to move the Divisional Court.

The plaintiff moved for judgment for the sum of £80 on the findings, and the defendants moved that the verdict should be set

aside, and that judgment be entered for them, or, in the alternative, for a new trial.

A. M. Sullivan and *M'Sweeney*, for the plaintiff:—

The jurisdiction under the Police Property Act (60 & 61 Vict. c. 30), s. 1, is exercisable only by a Court of summary jurisdiction, and the two Justices sitting in the day-room of the police barrack were not such a Court. Jurisdiction under the Act can only be exercised on notice or summons given to the party affected by the application: *Ex parte Francis* (1). There was no jurisdiction under the Act to make an order with regard to property involving an investigation of title to real estate. There was no evidence before the Justices sitting in the police barrack upon which they could form a belief that any crime had been committed in relation to the barley. The Justices, in any event, had no jurisdiction to enter upon an inquiry when they knew the acts complained of were done in an honest belief in a claim of right. The order, being without jurisdiction, and having been quashed, proof of malice and want of reasonable and probable cause is not necessary to maintain an action. The plaintiff had lawful possession of the barley, which was his property as bailee for the legal owners; and the person to whom the barley was delivered under the Justices' order had no property in it.

J. F. Moriarty, K.C., and *W. H. Boyd*, for the defendants:—

The plaintiff, Michael Quinn, is not entitled to maintain the action, as he was a mere trespasser, who had no title to the barley. He had no possession of the barley at the time when the order was made by the Justices to deliver it to John F. Bourke. At that time the barley was in the possession of the police, under the warrant issued on the 14th September. Upon the evidence the only person entitled to the barley (and to the lands on which the barley was grown) was John F. Bourke, who had been in exclusive possession since the date of his conveyance, the 22nd January, 1903; and John F. Bourke had sown the barley. In order to maintain this action, in any event, against the Justices, it is

(1) [1903] 1 K. B. 275.

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essential to prove that they had acted with malice, and without reasonable and probable cause, and that the barley had been taken out of the possession of Michael Quinn under the order of the 15th September, 1906.

[The following cases were referred to:—*Ackerley* v. *Parkinson* (1); *Peace* v. *Chaytor* (2); *Johnson* v. *Meldon* (3); *White* v. *Redfern* (4); *Ex parte Francis* (5); *Gill* v. *Bright* (6); *Buckley* v. *Gross* (7); *Blades* v. *Higgs* (8); *Rochford* v. *Rynd* (9); *Reg.* v. *Smith* (10).]

June 19.

PALLES, C.B.:—

Our judgment in this case must depend on the view we take of two questions of law.

The first is whether the matter in which the Justices were acting when they made the order for delivery over of the barley to Bourke was a matter in which they had jurisdiction. If they had not jurisdiction in the matter, then the case is within the 2nd section of the Justices' Protection Act, 12 Vict. c. 16, and the action can be maintained without any allegation of malice or want of reasonable and probable cause. On the other hand, if it was a matter in which they had jurisdiction, then their act, although it was one in excess of their jurisdiction, would not, according to a number of cases, of which *Ackerley* v. *Parkinson* (1), *Pease* v. *Chaytor* (2), and *Johnston* v. *Meldon* (3) are types, be sufficient to sustain an action unless there were malice and want of reasonable cause.

Here the jury have not agreed on the question of malice, and therefore it is essential for the plaintiff, in order to obtain judgment, to satisfy us that the matter was one in which the magistrates had not jurisdiction. Upon that subject we have had a very careful argument from Mr. M'Sweeney in reply; and I have arrived at a very clear conclusion that the matter was one in which the Justices had not jurisdiction.

(1) 3 M. & S. 411.
(2) 3 B. & S. 620.
(3) 30 L. R. Ir. 15.
(4) 5 Q. B. D. 15.
(5) [1903] 1 K. B. 275.
(6) 41 L. J. (M. C.) 22.
(7) 3 B. & S. 566.
(8) 11 H. L. Cas. 621.
(9) 8 L. R. Ir. 204.
(10) L. R. 10 Q. B. 604.

The right to make the order depends on sect. 1 of 60 & 61 Vict. c. 30, and the jurisdiction to make it is given to "a Court of Summary Jurisdiction." That Act does not define a Court of Summary Jurisdiction; and therefore to ascertain the meaning of the expression we are driven back to the Interpretation Act, 1889. Sect. 13(11) of that Act provides that "the expression 'Court of Summary Jurisdiction' shall mean any Justice or Justices of the Peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, by virtue of his commission, or under the common law."

The important words there are "to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts."

The magistrates have no power, either at common law or by virtue of their commission, to act in a matter of summary jurisdiction unless there is a statute giving power to do so. Justices, as is well known, were not an institution known to the common law, and no express power was, or could have been, given by their commission, *per se*, to convict summarily, because such a power would take away the ordinary constitutional right to a trial by jury, and can be conferred only by statute.

We are, therefore, driven back by sect. 13 (11) of the Interpretation Act, 1889, to ascertain what are the Summary Jurisdiction Acts there referred to, and we are told this by sub-s. 9: "The expression 'The Summary Jurisdiction (Ireland) Acts'" (which must mean the Summary Jurisdiction Acts in Ireland), "shall mean" (as respects the part of Ireland we have to deal with) "the Petty Sessions (Ireland) Act, 1851, and any Act, past or future, amending the same."

We have not been referred to any Act amending the Petty Sessions Act, 1851, as one material to be relied on, and, therefore, we are to construe the Petty Sessions Act, 1851, and, I think, in connexion with it, the Summary Jurisdiction Act, 1851, 14 & 15 Vict. c. 92.

On reading one section of each of these Acts the matter is made

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to my mind quite clear. Sect. 1 of the Summary Jurisdiction Act provides—"That it shall be lawful for any Justice or Justices sitting in Petty Sessions (or for any two Justices sitting out of Petty Sessions, when the offender shall be unable to procure bail for his appearance at Petty Sessions) within his or their respective jurisdictions, to hear and determine, either on the oath of one or more credible witnesses, or on the confession of the person against whom the complaint shall be made, all complaints relating to any offences, claims, or other matters under the provisions of this Act." This is the section which gives summary jurisdiction, *i.e.* jurisdiction to determine questions of fact by the Court as distinguished from a jury.

I now pass to the material section in the other Act, the Petty Sessions Act, 1851, s. 8 (2): "It shall not be lawful for any Justice or Justices to hear and determine any cases of summary jurisdiction out of Petty Sessions, except cases of drunkenness or vagrancy, or fraud in the sale of goods, or disputes as to sales in fairs or markets; but it shall be lawful for two Justices, if they shall see fit, to hear and determine out of Petty Sessions any complaint as to any offence when the offender shall be unable to give bail for his appearance at Petty Sessions." The effect of this section is identical with that of the 1st section of the Summary Jurisdiction Act: the one by positive, and the other by negative, words, confines the summary jurisdiction of a Justice not sitting in Petty Sessions to the case of an offender unable to give bail for his appearance at Petty Sessions.

With this knowledge we come to read the proviso at the end of the latter section:—"Provided always that nothing herein contained shall be construed to prevent any Justice or Justices acting out of Petty Sessions from making any order (not being in the nature of a conviction, or of an adjudication upon a complaint) which a Justice or Justices may be authorized or required by law to make."

Now my impression is that throughout these Acts there is a clear distinction drawn between the jurisdiction of a Justice, merely *qua* Justice, and the jurisdiction of a Court of Summary Jurisdiction, although it is constituted of Justices, or sometimes of one Justice; and my clear opinion is that this proviso relates to

acts which can be done by a Justice or Justices in their mere capacity of Justices, and not to acts which are required to be done not simply by Justices, but by such an assemblage of Justices as will constitute a Court of Summary Jurisdiction.

It is right to observe that from this proviso there is excepted the making of orders in the nature of a conviction or an adjudication upon a complaint. These are the two classes of orders that are authorized by sect. 1 of the Summary Jurisdiction Act to be made by a Court of Summary Jurisdiction—a conviction in the case of a criminal offence, an adjudication upon a complaint in reference to a matter of civil procedure in which they have jurisdiction. Upon the construction of these sections I am of opinion that it is impossible to bring the present case within the proviso I have read, because there is no Act of Parliament which gives jurisdiction to one Justice, or to more Justices than one, when sitting out of Petty Sessions, to act in such a case as the present as a Court of Summary Jurisdiction.

For this reason I have arrived at the clear conclusion that the whole proceeding was one *coram non judice*, and that the act of the defendants is one within sect. 2 of 12 Vict. c. 16.

As, however, the second ground on which it was contended that this was a matter in which the Justices had no jurisdiction has been very emphatically argued before us, I do not think that we ought to pass it over in silence. It was that the defendant ought to have been present, or at least summoned. The procedure which I conceive ought to be adopted under 60 & 61 Vict. c. 30, is the procedure prescribed by the Summary Jurisdiction Act, and the Petty Sessions Act, *i.e.*, a procedure by summons. In this particular case not only was the adjudication made in the absence of the party, but he was not even summoned to the proceedings. It has been argued, and as I think rightly, that, by reason of the plaintiff not having been present or summoned, the matter was one in which, *quoad* him, the magistrates had no jurisdiction to proceed at all.

The only cases I wish to refer to on this subject are *White* v. *Redfern* (1), in which it was held that proceedings under the

(1) 5 Q. B. D. 15.

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statute there in question could be taken without notice, and that of *Ex parte Francis* (1), a case nearer to the present, in which a summons was held essential.

The question in *White* v. *Redfern* (2) arose on a power under the Public Health Act, 1876, to seize meat intended for the food of man which was diseased or unsound, and to carry it before a Justice, who might order it to be destroyed. Field, J., held that such order might be made, although no notice had been served on the owner of the meat. The grounds of his decision are in these words :—" Then is he bound to give notice to the owner before proceeding to apply to a Justice to condemn the article so seized? It is contended that he is bound to give such notice, by which I suppose is meant that he must take out a summons, as is usual in the case of most proceedings before magistrates. Ordinarily such a proceeding would be necessary. The Legislature generally cannot be considered to have intended that a man's property may be destroyed without giving him an opportunity of being heard, but here the paramount object would appear to be the speedy destruction of a noisome and unwholesome thing. There is nothing in the words of sect. 117, which gives power to the magistrate to condemn the article seized, to lead to the conclusion that he is to hear anybody. All he has to do apparently is to inspect the article, and if he is satisfied that it is unsound or unwholesome, he is to condemn the same and order it to be destroyed, or so disposed of as to prevent its being used for food. The primary object is the prevention of an evil which in the nature of things presses for an immediate remedy."

Thus the basis of the judgment there was that the paramount object of the statute in question was the speedy destruction of a noisome and unwholesome thing. In the present case it cannot be said that it was not the intention of the statute that the party should be heard, because power is given to order the delivery to the other party, and the time within which an action can be brought against that party is limited to six months.

In these respects the common law rights of the person from whom the police took the property are materially affected.

(1) [1903] 1 K. B. 275. (2) 5 Q. B. D 15.

I entirely agree in the judgment of the Lord Chief Justice in *Ex parte Francis* (1) distinguishing that case from *White* v. *Redfern* (2). He says :—"Now it has been for many years a well-established principle of law that legal proceedings affecting the rights of persons or owners of property must not be taken unless notice has been given to those persons, and, as was pointed out by Field, J., in *White* v. *Redfern* (2), in the case of proceedings under the Summary Jurisdiction Acts, a summons is the method by which notice is given." He then refers to *Gill* v. *Bright* (3), a case I need not occupy public time by considering here.

Therefore, for this second reason, I am of opinion that this was a matter which was wholly outside the jurisdiction of the Justices.

This being so, it is unnecessary to discuss a number of cases that have been mentioned, for the simple reason that they have no application to the present. If I thought that this was a matter which was within the jurisdiction of the Justices, but that they went wrong in a proceeding within their jurisdiction by making an order they had no power to make, I should have arrived at a different conclusion, just as I did in *Johnston* v. *Meldon* (4). But here the case is too plain. The matter was wholly outside the jurisdiction of the magistrates. *Non sunt judices.* The whole proceeding was *coram non judice.*

This is the first point we have to decide, and we decide it in favour of the plaintiff.

I now come to the second point for our decision.

It is said that in the circumstances of the case the plaintiff here had not such a possession of the goods as would entitle him to maintain the present action, which for shortness may be taken as equivalent to an action of trover under the old law, with this modification, that, instead of relying on simply stating the conversion, the plaintiff's pleading sets out argumentatively circumstances which he alleges constitute a conversion.

Now, the way in which the defendants here put the case, as I

(1) [1903] 1 K. B. 275.
(2) 5 Q. B. D. 15.
(3) 41 L. J. (M. C.) 22.
(4) 30 L. R. Ir. 15.

K. B. Div. 1907.

QUINN v. PRATT.

Palles, C.B.

understand it, is this. It is said, assuming that there was a possession in the plaintiff here before the seizure of the barley under the search-warrant, the effect of that seizure was to take the possession out of him and vest it in the police; that the Act 60 & 61 Vict. c. 30 recognizes as possession that which perhaps otherwise we should prefer to call *custodia legis* instead of actual possession; and that, therefore, the lawful possession was in the police. It is said, then, that as there was no evidence of property in the plaintiff, he cannot succeed by virtue of property, and that, as his possession had ceased, he cannot succeed by virtue of possession, and therefore he cannot succeed at all.

The argument is a captivating one; but on consideration I have come to the conclusion that it involves not one, but two, fallacies.

I take first the argument that the plaintiff cannot succeed by virtue of property. For the purpose of this argument it must be assumed that he had lawful possession. And here I ought to say that I entertain no doubt that there was evidence of lawful possession to go to the jury, and it has been found by the jury to be in the plaintiff. I think it wholly immaterial, as regards the defendants, who are wrong-doers, that that possession was as agent, because possession as agent or bailee is sufficient to maintain an action against a wrong-doer.

Assuming there is possession, what is the effect of that? Why is a person in possession able to maintain an action of trover? The true reason is, because it is evidence of property. In modern times it has been considered to be conclusive evidence of property, so that the argument that the case is to be treated as if the plaintiff had no property in these goods is entirely answered by that consideration.

I find the origin of the rule stated in a work of great authority (2 Wms. Saund., p. 96) as follows:—"So possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action" [trover] "against a wrong-doer; for *possession is* primâ facie *evidence of property*: *Blackham's Case* (1)." Sir Edward Vaughan Williams'

(1) 1 Salk. 290.

note on this is as follows:—"This passage was cited and relied upon by all the members of the Court in *Jeffreys* v. *Great Western Railway* (1), in which case it was decided that a wrong-doer cannot give in evidence the title of a third person against whom he is himself a wrong-doer. In *Elliott* v. *Kemp* (2), Parke, B., appears to have considered the question as doubtful, whether in an action of trespass or trover for personal property 'the simple fact of possession, which is unquestionably evidence of title, is conclusive evidence, and constitutes a complete title in all cases against the defendant who is a mere wrong-doer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels in which the plaintiff had a special property in such chattels.' This question was regarded by Crompton, J., to be answered in the affirmative, by the decision of *Jeffreys* v. *Great Western Railway* (1). The point appears to have been considered as doubtful by Jervis, J., in *Newnham* v. *Stevenson* (3). But it has never been doubted since *Jeffreys* v. *Great Western Railway* (1). See *Northam* v. *Bowden* (4); *Bourne* v. *Fosbrook* (5)."

Therefore it is that this action can be maintained by the conclusive evidence of property that is involved in the lawful possession found by the jury.

I now come to another answer to the defendants' second contention. Assuming that the plaintiff is relying on possession as distinct from property, how does the matter stand? I should have thought it elementary that when goods were seized by the police they were held by them *in usum jus habentis*, and that when the proceeding in aid of which they were seized, that is, the criminal proceeding for larceny, had come to an end, or at all events, when the goods were wrongfully taken out of their possession, the possession would have been deemed to re-vest in the plaintiff, and that the re-vesting would have relation back to the time of the original taking, on the principle that when goods are *in custodiâ legis*, as when taken under a distress, if there is ill-treatment or unlawful destruction, the original owner can sue.

(1) 5 E. & B. 802.
(2) 7 M. & W. 312.
(3) 10 C. B. 722.
(4) 11 Exch. 70.
(5) 18 C. B. (N. S.) 515.

K. B. Div. 1907. QUINN v. PRATT. Palles, C.B.

But I find in the same work, 2 Wms. Saund., p. 91, the case put exactly :—"In like manner a man who has delivered goods to a carrier or other bailee, and so parted with actual possession,"—and in the present case it cannot be said that the plaintiff, whose goods have been taken out of his possession by the police, is in a worse position—"may maintain trover for the conversion by a stranger; for the owner is still *possessed in law against a wrong-doer*, and the carrier or other bailee is no more than a servant."

Upon this ground I am of opinion that the second point cannot be relied on by the defendants.

I should like to say just one word as to the evidence of the plaintiff's possession.

I think there is plain evidence that the goods were in the possession of the Mansfields as distinct from the possession of Bourke, and that the actual possession was in the plaintiff as the agent of the Mansfields, as distinguished from the actual possession being in the minor children. Again, I think that there is no evidence that this barley was stolen. It is plain upon the entire of the evidence that the taking possession of this farm before the barley was reaped was a taking possession under colour of right. There being therefore no evidence of larceny, it appears quite plain that the possession was a lawful possession as against everybody except Bourke, if Bourke were proved to be the true owner. In this case there is no evidence that Bourke was the true owner; but even if he were, for the reasons I have stated, I would hold that the matter could not be gone into, on the principle laid down in *Jeffreys* v. *Great Western Railway* (1).

I desire, before concluding, to express the opinion I formed at an early stage of the case, that the magistrates acted with perfect *bona fides*. I would not have been satisfied with a verdict against them on the question of malice. I think that they were placed in a very difficult position by the mode in which the case was brought before them by the authorities, a Court being constituted that had absolutely no jurisdiction. They acted, as I have said, with perfect *bona fides*; they puzzled through a number of deeds that had nothing to do with the case, in order to ascertain who

(1) 5 E. & B. 802.

was the owner of the barley; and I hope some mode will be found by the public authorities to reimburse them for any loss they may sustain, and to prevent them from having themselves to bear the burden of the damages and costs of this litigation. We, however, have nothing to do with that.

We are both of opinion that the two propositions I have mentioned were satisfactorily established in favour of the plaintiff.

We are also of opinion that the amendment made at the trial ought not to have been made, for this reason, if for no other, namely, that it was made more than six months after the delivery over under the order of the magistrates, and therefore would have enabled the Mansfields to maintain an action at a time when the Justices were entitled to protection.

Andrews, J., concurred.

Solicitor for plaintiff: *P. J. O'Driscoll.*
Solicitor for defendants: *M. R. Hegarty.*

J. L.

Appeal.
1908.
Feb. 9, 16.

KATE KELLY (LEGAL PERSONAL REPRESENTATIVE OF EDWARD HOWELL, DECEASED), APPLICANT; MARY HOPKINS, RESPONDENT (1).

Employer and workman—Accidental death of workman—Compensation—Dependency on workman's earnings at time of death—Widow—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

On the hearing of a claim for compensation under the Workmen's Compensation Act, 1906, by the personal representative of a deceased workman who died as the result of an accident arising out of and in the course of his employment in respondent's service, it appeared that the deceased had maintained his wife until her removal as a dangerous lunatic to a lunatic asylum, where she was detained under confinement, and where she was being maintained by the asylum authorities at the date of her husband's death:—

Held, by the Court of Appeal, affirming the decision of the County Court Judge, that these circumstances were insufficient to rebut the presumption of dependency, and that there was a total dependency of the wife on her husband's earnings.

APPEAL by the respondent from a decision of the County Court Judge of the County Carlow, sitting as an arbitrator under the Workmen's Compensation Act, 1906, whereby he awarded the applicant £150 compensation.

The appeal raised the question—Whether Mary Howell, the widow of the deceased workman, Edward Howell, was, within the meaning of the Act, wholly or in part dependent upon the earnings of the deceased workman at the time of his death?

Edward Howell, who was employed as a farm labourer by the respondent, died on the 22nd October, 1907, as the result of an accident arising out of and in the course of his employment.

The applicant was legal personal representative of the deceased, acting on behalf of his dependant, the latter being, as alleged, Mary Howell, widow of the deceased, and wholly dependent on his earnings.

(1) Before THE LORD CHANCELLOR and FITZ GIBBON and HOLMES, L.JJ.

The deceased lived with and maintained his wife until the 16th June, 1907, when the latter was committed to the Carlow District Lunatic Asylum as a dangerous lunatic; and she was in detention there, and being maintained by the authorities of the asylum, at the date of her husband's death. There was no evidence as to the possible or probable duration of her insanity.

The County Court Judge held that at the time of the death there was a pecuniary obligation upon the husband to support his wife; that the wife was totally dependent; and he awarded £150 compensation.

Littledale, K.C., and *P. O'C. White*, for the appellant:—

The presumption that a wife is dependent on her husband is capable of rebuttal: *per* Cozens-Hardy, M.R., in *Williams* v. *Ocean Coal Co.* (1). The evidence here shows that the widow was not wholly or in part dependent upon the earnings of her husband at the time of his death within the Workmen's Compensation Act, 1906, sect. 13. A dependant to get compensation must have been to some extent dependent on the deceased for the ordinary necessities of life: *Simmons* v. *White* (2). Here the widow was at the date of the death being maintained by the asylum authorities, and was not receiving one penny from her husband. *Queen* v. *Clarke* (3) is distinguishable; there the widow had been living with her father, who supported her voluntarily, and she could have left him at any time and returned to her husband. Here there is a statutory obligation to detain the widow under confinement, and to maintain her, until she dies or is discharged by due authority: 30 & 31 Vict. c. 118, s. 10. This case is ruled by *Rees* v. *Penrikyber Navigation Colliery Co.* (4), where it was held that a pauper inmate of a workhouse, towards whose maintenance no contribution was in fact made by his son, was not in part dependent on his son's earnings, notwithstanding the son's obligation to contribute to his father's maintenance. Compensation if awarded will not be retained for the widow's benefit, in case she should recover, but will be applied to her maintenance in the

(1) [1907] 2 K. B. 422.
(2) [1899] 1 Q. B. 1005.
(3) [1906] 2 I. R. 135.
(4) [1903] 1 K. B. 259.

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asylum: 38 & 39 Vict. c. 67, s. 16. It was never intended by the Legislature that compensation should be awarded for the relief of rates.

[They also referred to and distinguished *Coulthard* v. *Consett Iron Co.* (1) and *Williams* v. *Ocean Coal Co.* (2).]

James O'Connor, for the applicant, was not called upon.

Feb. 16.

THE LORD CHANCELLOR:—

In this case a question was raised whether a claim could be maintained by the legal representative of deceased on behalf of Mary Howell, the widow of a labourer, Edward Howell, as dependent upon her husband at the time of his death by accident.

On the 16th June, 1907, Mary Howell was admitted into the Lunatic Asylum at Carlow as a dangerous lunatic; and up to that date she had been supported and maintained by her husband. On the 14th October, 1907, the husband was killed. The widow was still in the asylum, and was maintained there.

The finding of the County Court Judge was:—"I held that at the time of his death there was a primary obligation upon the husband to support his wife. The joint committee of the asylum might have sued and rendered him liable for her support. If she recovers at any time, she will be discharged, and will be destitute by reason of her husband's death. I held that she was totally dependent, and awarded £150. If by reason of being an inmate of a lunatic asylum Mary Howell was not in point of law dependent upon her husband within the provisions of the Workmen's Compensation Act, 1906, the application should be refused."

There is no doubt that under the provisions of the 30 & 31 Vict. c. 118, there was an obligation on the Committee of the Asylum to maintain the inmate while in confinement there, and if she acquired an estate, the 16th section of the 38 & 39 Vict. c. 67 contains provisions by which such estate could be made applicable for her maintenance; and it was contended on behalf of the appellant that although the relation of husband and wife existed,

(1) [1905] 2 K. B. 869. (2) [1907] 2 K. B. 422.

the wife was, by process of law against her own volition, placed in the asylum; she was not in fact at the time of death maintained by him, but by the asylum authorities: and therefore, that she was not a dependant within the meaning of the section of the statute. I am of opinion that the question which we have to decide has been settled in the case of husband and wife by decisions both in this country and in England.

The case for the appellants was rested upon the decision in *Rees* v. *Penrikyber Navigation Colliery Company* (1). The question there was, whether a father, an inmate of a workhouse, was a dependant on a son, a workman who was killed by an accident on the 15th January, 1902. He had occasionally contributed towards his father's support; and for a short period in 1897, when the father was an inmate of the workhouse, he had contributed 1*s.* 6*d.* a week towards his maintenance, under an order of Justices; but in May, 1901, the father again went into the workhouse, and remained there till his son's death, in January, 1902, and during this period the son contributed nothing; and no order was made upon him by Justices at the instance of the guardians. The County Court Judge found as a fact that the father was not a dependant within the meaning of the Act. As a fact the son was not contributing; but there was an indirect obligation under the poor law to contribute, which might have been put in force.

Romer, L.J., during the argument, puts the case: "Here the son was not legally liable to maintain his father. Must you not, therefore, make out a state of actual dependency at the time of the death?" To this the only answer made was the existence of the indirect liability to contribute. The Master of the Rolls mainly founded his judgment upon the finding of fact by the County Court Judge. He also says: "The claim involves the contention that, where a person is an inmate of a workhouse, and there is another person outside against whom a liability under the poor law to contribute to his support could be enforced, the former must as a matter of law be dependent on the person outside"; and then he refers to the language of the section as to dependants in negativing that contention. So far as the question is one of fact,

(1) [1903] 1 K. B. 259.

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The Lord Chancellor.

the finding of the County Court Judge is here the other way; but I think we should deal with the question as one of law. That was not a case of husband and wife, and it was cited and relied on in *Queen* v. *Clarke* (1) before us. I shall shortly state the facts of the latter case from the summary of them in my own judgment at p. 140. [His Lordship read the facts, and continued.] On those facts Lord Justice Holmes and I were of opinion that the wife was wholly dependent on her husband at the time of his death; Lord Justice Fitz Gibbon was of opinion, having regard to the finding of the Recorder, that she was only partially so, as she had been maintained by her father. I rested my opinion on the two Scotch cases, mentioned in the judgment, and *Coulthard's Case* (2), where the County Court Judge found that the wife was wholly dependent on her husband. There the "wife after her husband left her had no regular means of subsistence; she did casual work when she could get it, and received doles from relations whose charity kept her alive." We allowed the appeal, and remitted the case to the Recorder, with a declaration that the wife was wholly dependent on her husband. That case, and the authorities cited in it, establish in this country that the relation of husband and wife, and the obligations which it creates, distinguish such a case from *Rees* v. *Penrikyber Navigation Colliery Company* (3), which, as I said, was relied on before us.

But the recent case of *Williams* v. *Ocean Coal Company* (4), in which all the authorities were reviewed, has settled the question in England. There a workman was married to his wife in 1903; they lived together for some time, first with the wife's parents, then in apartments, and then with the husband's parents. In 1904, the wife returned to her own parents, the husband leaving her to seek work, and he ultimately was employed as a miner in an adjoining village where the wife occasionally visited him. The last time they met was in December, 1905, and the husband was killed in April, 1906, while working for the respondent company. The husband had not contributed to his wife's support since 1904, and at the time of his death she was in employment as a domestic servant. The Court of Appeal there held that there was a total

(1) [1906] 2 I. R. 135.
(2) [1905] 2 K. B. 869.
(3) [1903] 1 K. B. 259.
(4) [1907] 2 K. B. 422.

dependency of the wife, and that the presumption in favour of the wife's dependency was not rebutted by the evidence that the husband was contributing nothing to the support of his wife, and that she was maintaining herself; and the Master of the Rolls says—"The presumption is not rebutted by proof that she was in the workhouse at the date of his death." That case seems to me conclusive; all the special facts of the case before us are in favour of the widow's right. She is living away owing to casual circumstances against her own volition, which may cease to exist at any time. She had been supported till she went into the asylum. There is no presumption that insanity will continue. The contrary is the case. It is the same as if she had gone into hospital for treatment.

We are all of opinion that the decision of the County Court Judge was right, and the appeal must be dismissed.

FITZ GIBBON, L.J.:—

It is impossible to hold consistently either with *Williams'* (1) or *Coulthard's Case* (2), or with our own decision in *Queen's Case* (3), that the applicant ceased to be dependent on her husband's earnings within the meaning of the Workmen's Compensation Act, by the mere fact that he had ceased to contribute to her support on her committal as a dangerous lunatic. Such a conclusion would, in the case of a husband and wife, be revolting to the ordinary understanding of words, and it would lead to consequences contrary to common justice. A temporary stay in a hospital, even during child-birth, or a casual engagement in service, might deprive a widow of all compensation for her husband's death. In the present case the obligation on the asylum to maintain its inmates cannot make them "dependants" on it. I am not satisfied with the existing state of the authorities as to the circumstances which reduce dependency from being total to being partial, or as to the effect of the actual possession of means of living other than the workman's earnings at the time of his death. I differed from my colleagues upon that matter only in *Queen's Case* (3)—thinking that their decision practically made it impossible to treat

(1) [1907] 2 K. B. 422. (2) [1905] 2 K. B. 869. (3) [1906] 2 I. R. 135.

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dependence as partial only, where the marital obligation of support continued, even though there was no actual performance of that obligation by the husband at or even for a time before his death, or though the wife was actually supported from other sources. But even if the maintenance received by the wife in this case could be treated as similar to that given by the father in *Queen's Case* (1) (which I do not think it can be), this case would still be ruled against the appeal by the decision of the majority of our own Court in *Queen's Case* (1).

HOLMES, L.J.:—

The deceased was not only under a legal and moral obligation to maintain his wife, but he faithfully performed this duty until a short time before his death. His ceasing to do so did not arise from the voluntary act of either. She unfortunately became insane; and it became necessary to commit her to a lunatic asylum as a dangerous lunatic; but I am satisfied that this did not put an end to her being wholly dependent on her husband's earnings. It was a casual break in their mode of living, but her lunacy, in its dangerous character, might have terminated at any time before his fatal accident, when her actual dependency would have been at once renewed.

The case has been argued by the appellant upon the assumption that the husband was legally relieved from the duty to maintain her while she was in the asylum. I think that this is inconsistent with our decision in *Queen* v. *Clarke* (1), which followed *Coulthard* v. *Consett Iron Co.* (2), and the principle of which has been since extended in *Williams* v. *Ocean Coal Co.* (3). *Rees* v. *Penrikyber Navigation Colliery Co.* (4) has been relied on by the appellant; but it was decided before the other cases to which I have referred, and can be distinguished from them in its facts. I therefore concur in the judgment of the Court.

Solicitors for the appellant: *C. Thorp & Son.*
Solicitor for the applicant: *Paul A. Brown.*

R. ST. J. C.

(1) [1906] 2 I. R. 135.
(2) [1905] 2 K. B. 869.
(3) [1907] 2 K. B. 422.
(4) [1903] 1 K. B. 259.

CARLOS *v.* THE CONGESTED DISTRICTS BOARD (1).

K. B. Div. 1908. Feb. 12.

Practice—Remittal of action—Cause of action not shown—Master and servant—Injury to servant—Action for negligence—Bad or defective system of work—Neglect to provide proper plant to prevent accidents—Duty of master—Delegation of such duty—Fellow-servant—Common employment.

On an application to remit to the County Court an action brought under Lord Campbell's Act (9 & 10 Vict. c. 93) by the representatives of a deceased workman against his employer for negligence causing his death, it appeared that the employer had delegated to a competent person—a fellow-workman of the deceased—the duty of adopting a safe and proper system of work, and of providing materials for that purpose. It also appeared that it was by reason of the negligence, if any, of such fellow-workman in not adopting a safe and proper system of work that the deceased was killed:—

Held, that the plaintiffs had not disclosed a cause of action against the defendant, and that the action should therefore be remitted to the County Court.

MOTION TO REMIT.

The action was brought under Lord Campbell's Act by the representative of a workman named Michael Carlos against the Congested Districts Board, to recover damages for negligence causing the death of the said Michael Carlos, whilst working in the employment of the defendants. The circumstances under which the deceased man met his death were set forth as follows in an affidavit sworn by Thomas Connaughton, and filed by the plaintiff:—

"On May 6th, 1907, the day on which Michael Carlos was killed, I was employed with the deceased and others in the demolition of certain ruins, consisting of old brick arches or arched cellars, situate at Willsgrove, Ballintubber, in County Roscommon. The ground immediately beneath each of these arches was at a lower level than the surrounding arches, and it was in the course of the demolition of one of these arches that the deceased was

(1) Before WRIGHT, J.

K. B. Div. 1908.

CARLOS v. CONGESTED DISTRICTS BOARD.

killed . . . we were working under the control and direction of a ganger named Thomas Kenny. The general arrangement and system of the work, and the orders issued to us, pursuant to which we were to carry out the work, were as follows :—

"We were directed to loosen with pick-axes and remove the bricks built into, and constituting the top or roof of the arch, and then from time to time to pick up and remove any bricks which had fallen beside or underneath the arch. We were directed to save all the bricks which were taken out of the arch, and to stack them close by, as they were required by the Board for building purposes. The old arch, upon and beneath which we were so working, was not supported in any way, nor was there any scaffolding or timber centering placed beneath it, so as to prevent a sudden collapse of the arch, or provide for our safety if a collapse should occur.

"During the course of this work, when the deceased man had gone, in pursuance of these instructions, beneath the arch, and was picking up the bricks which had fallen into the cavity beneath it, the top or roof of the arch suddenly collapsed and fell in upon him. There was not at the time any person upon the top of the arch. I was close by at the time of the occurrence, and tried to rescue the deceased, but another portion of the arch fell in upon me. The deceased man was quickly taken out, but he was then dead.

"Neither I nor my fellow-workmen, who were all men of the farming class from the district, were accustomed to such work, nor had any of us any previous experience of work of the kind; and I did not, nor I believe did any of us, realize the danger or understand the risk of the work as we were ordered to carry it out. I never thought, nor I believe did any of us, of the possibility of a premature collapse of the arch, since no precautions were taken by our employers to prevent or provide for such an occurrence. The deceased and I were working together, and neither of us took any voluntary risks.

"The danger of, or arising from, such a collapse could have been guarded against by the erection of scaffolding or timber centering beneath the arch, and I have since been informed by several persons who have had experience of such work, and I

believe, that any person with a practical knowledge of building or engineering should, under the circumstances, have provided for such a collapse; and that it is the universal custom to place scaffolding or timber centering under such buildings when they are being demolished." The deponent stated that the defendants did not take reasonable or ordinary precautions to ensure the safety of the men engaged on the work—that the dangerous nature of the work must, or ought to, have been known to the defendants —that Michael Carlos would not have been killed if the arch had been made reasonably secure by scaffolding, or if he had not been required to go beneath it in the course of his work; and that his death was directly due to the defective system of work which was adopted. The affidavit ended as follows:—"Thomas Kenny, who was the ganger under whose control and direction we were, is quite a young man, and he admitted upon oath in my hearing, at the inquest which was held after the death of Michael Carlos, that he had had no previous experience of such work, and that he had not in fact thought the place dangerous to work according to the directions which he had given us, and to which I have deposed. Except the said Thomas Kenny, there was not any person who could be described as clerk of the works at Willsgrove."

In an affidavit filed by the defendants, Robert Sullivan, a civil engineer, deposed that he acted as clerk of the works for the Congested Districts Board in connexion with the work at Willsgrove, that the work was carried out under his directions, and that he was at the works when Michael Carlos was killed. He also deposed that he did not consider the work dangerous, and would have given directions for the erection of scaffolding or propping if he had thought it necessary. Thomas Kenny, he stated, was a good and careful man, who worked under him and took his instructions from him.

An affidavit by Thomas Kenny, confirming the statements of Sullivan, was also filed by the defendants. These three affidavits contained all the evidence given on the motion as to the occurrence which resulted in the death of Michael Carlos. Both Sullivan and Kenny denied that the men were required to go under the arches, and stated that they were cautioned as to the danger of doing so.

K. B. Div. 1908.

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H. Hanna for the defendants:—

The action ought to be remitted on the ground that no cause of action has been disclosed. An employer can delegate to a person, whom he believes to be competent, his duty to take reasonable means to safeguard his workmen from accidents in the course of their employment, and to adopt a safe and proper system of work. If he does so, he can rely on the doctrine of common employment as a defence in an action for negligence: *Cribb* v. *Kynoch, Limited* (1); *Young* v. *Hoffman Manufacturing Company, Limited* (2). It is clear that the Congested Districts Board delegated their duty in this respect to Sullivan and to Kenny. Both these men were fellow-workmen of Michael Carlos; and it was owing to their negligence, if any, that he was killed. The case is ruled by *Tennyson* v. *Milligan* (3).

Leonard (*Powell, K.C.*, with him), for the plaintiffs:—

A master is bound to take reasonable precautions against accidents to his workmen, and to supply proper plant: *Smith* v. *Baker* (4); *Wilson* v. *Merry* (5). If he does not do so, he is liable for personal negligence; he cannot delegate this duty: *Williams* v. *Birmingham Battery Company* (6). In *Cribb* v. *Kynoch, Limited* (1), and *Young* v. *Hoffman Manufacturing Company, Limited* (2), it was assumed that the employer had supplied proper plant. It is not denied that it is the universal custom to use scaffolding or props in work such as that on which the deceased man was engaged.

H. Hanna in reply:—

Smith v. *Baker* (4) is not inconsistent with the cases which I have cited as to the power of an employer to delegate to a competent person his duties towards his workmen.

(1) [1907] 2 K. B. 548.
(2) *Ibid.* 646.
(3) See *infra*, p. 96.
(4) [1891] A. C. 325, at pp. 339, [353.
(5) L. R. 1 Sc. App. 326.
(6) [1899] 2 Q. B. 338.

WRIGHT, J.:—

This action is brought under Lord Campbell's Act to recover damages for negligence causing the death of the plaintiff's son. The defendants have moved to remit the action on the grounds that the plaintiff has no visible means, and that the action is not fit to be retained in the Superior Courts. As to the first point, I am satisfied that the plaintiff has no visible means, and I overrule Mr. Leonard's preliminary objection that the statements to that effect in the defendants' affidavits are made on information and belief, and that the source of the information is not disclosed.

The second point raises a very interesting question, which is said by Mr. Hanna to be covered by the decision of the Court of Appeal in *Tennyson* v. *Milligan*, which unfortunately is not reported. The question is, has the plaintiff disclosed a cause of action against the defendants? If he has, it is manifest that the action should be retained in the Superior Court; if he has not, it is contended that he has not a cause of action fit to be prosecuted in the Superior Court, and that it ought to be remitted. The facts, as appearing in the affidavits, are shortly as follows:—The plaintiff's son was killed by the collapse of an arch, while engaged on the demolition of an old house, being employed by the defendants for that purpose. I have considered the question very carefully, and have come to the conclusion that the affidavits filed on behalf of the plaintiff show that the accident arose through the negligence of Sullivan or of Kenny—it does not matter which of them: they were both fellow-servants of the deceased—and while the deceased man was working under them, or one of them. I think that Mr. Hanna's contention is right, namely, that the defendants might delegate to a competent engineer or foreman the duty of taking reasonable and proper precautions against accidents to their workmen in carrying out the work on which they were engaged, and that when a master has so delegated his duty, he may rely on the doctrine of common employment as a defence to an action founded on the negligence of the person to whom he has delegated his duties.

Assuming that the accident in this case was due to a bad or defective system of carrying out the work on which the deceased man was engaged, I am of opinion that the whole matter, namely

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Wright, J.

the system of carrying out the work and providing proper plant and materials to prevent such a collapse as occurred, or other accident, was within the province of Sullivan, and under his control, and therefore, that no action founded on his negligence can be brought against his employers for injuries caused to workmen engaged on work under his superintendence. Accordingly, I am of opinion that the affidavits on which plaintiff relies show no cause of action against the Board, the defendants, and that the case must be remitted to the County Court.

The legal principle involved in this case is of considerable importance, and I shall welcome the decision of the Court of Appeal if the case is brought before it.

Solicitor for the plaintiff: *Maurice Staunton.*
Solicitor for the defendants: *Matthew Good.*

J. C. W.

TENNYSON *v.* JOHN MILLIGAN & CO., LIMITED.

(*Ex relatione* Mr. R. C. De VERSAN, Registrar, Court of Appeal.)

A MOTION to remit this action to the County Court was heard in the King's Bench Division, before Palles, C.B., and Boyd, J., on the 30th June, 1904, and on appeal, before Lord Ashbourne, C., and Holmes, L.J., on the 7th July, 1904.

The action was brought to recover damages from the defendant Company for negligence. The plaintiff, Patrick Tennyson, was a workman in their employment. The facts were practically undisputed, and appear from the affidavits to have been these:—

The defendant Company's s.s. "Kathleen" was discharging a cargo of coal into the defendant Company's lighter "Englishman" at Belfast. The coal was being taken out of the "Kathleen" in iron tubs, which were hoisted into the "Englishman" by means of two cranes, the property of the Belfast Harbour Commissioners, and worked by cranesmen in their employment. These cranes had been hired for the purpose from the Belfast Harbour Commissioners by the defendant Company. The plaintiff was lighterman on board the "Englishman," his duty being to see that the vessel was properly loaded. While the work was in progress the arms of the two cranes collided, and in consequence a large quantity of coal fell from one of the tubs, inflicting severe injuries on the plaintiff. In an affidavit made for the purpose of resisting the motion to remit, the plaintiff stated—(1) "The cranes and cranesmen were

under the control of the defendant Company, and the latter worked and placed the cranes as directed by the defendants. (2) The method of working the two cranes at the same time was negligent, dangerous, and unsafe to the workmen, as there was a likelihood of the iron tubs or the two 'jibs' colliding. (3) Earlier in the day, and prior to the accident, I observed the negligent, unsafe, and unusual method of working the cranes. I called the attention of the foreman to it, and asked him to have the jibs placed so that no collision could occur; but no change was made. The method, though unsafe, was speedier than the ordinary method."

The King's Bench Division remitted the action, on the ground that the affidavit of the plaintiff did not disclose a cause of action against the defendant Company.

In the Court of Appeal it was argued by—

H. Hanna, for the plaintiff, who contended that the defendant Company had adopted a dangerous method of working, and were therefore liable.

Hume, K.C., for the defendant Company, argued that if there was any negligence it was that of a fellow-servant of the plaintiff.

The following cases were cited:—*Smith* v. *Baker* ([1891] A. C. 325); *Griffiths* v. *London and St. Katherine's Docks Co.* (12 Q. B. D. 493); and *Howells* v. *Landore Steel Co.* (L. R. 10 Q. B. 62).

THE COURT OF APPEAL affirmed the decision of the King's Bench Division, on the ground that no cause of action was shown.—[J. C. W.]

K. B. Div.
1908.
Feb. 14.

M'COLLUM *v.* PAUL (1).

Practice—Procedure—Loss of an original writ—Leave to seal and serve a copy—Mode of application—R. S. C., I. (1905, 22*nd February*), *Ord. VIII., R.* 3.

Where a writ has been lost or destroyed, and an order is sought that a copy of such writ shall be sealed and served in lieu of the original, the application may be made by motion *ex parte*.

MOTION for an order that a copy of the writ in the action should be sealed and served, the original having been lost.

T. J. Smyth moved *ex parte*. He referred to Gen. Ord. VIII., R. 3, and called the attention of the Court to the practice in England, as stated in the Annual Practice, vol. i., p. 43.

WRIGHT, J. :—

The practice in this country is to hear these applications upon motion *ex parte* (2).

Solicitor for the plaintiff : *W. J. Fegan.*

J. C. W.

(1) Before WRIGHT, J.

(2) A similar order was made by Holmes, J., upon motion—*Ex parte Commissioners of Public Works* v. *Healy*—on 24th April, 1894 ; and the practice has been to hear these applications upon motion *ex parte* since that date.

HERSKIND & CO. *v.* HALL & CO., LIMITED (1).

K. B. Div.
1908.
Feb. 14.

Practice—Order for discovery of documents—Individuals suing under the name of a firm—Form of order—R. S. C., I. (1905, 22*nd February*), *Order XXXI., R.* 12.

Where individuals sue, or are sued, under the name of a firm, and an order for discovery of documents is made against them, it is not necessary that the order should specify the name of the individual to make discovery.

MOTION for the issue of an order for discovery of documents.

An order for discovery of documents was made against the plaintiffs, who were a number of individuals suing under the name of "Herskind & Co." The order was directed to "the plaintiffs," but did not name any individual as the person to make discovery. The officer required the defendants to name the person to make discovery, and refused to issue the order otherwise.

H. Hanna moved *ex parte*, that the order should issue, and referred to Ord. XXXI., R. 12, and the note at p. 495 of Wylie's Judicature Acts and Rules (2nd ed.).

WRIGHT, J.:—

The defendants are, in my opinion, entitled to have the order issued in its present form, without calling upon the plaintiffs to declare the names or name of the persons or person constituting the firm.

Solicitors for the defendants: *Carson & McDowell.*

J. C. W.

(1) Before WRIGHT, J.

K. B. Div. 1908.

DONOVAN & CO. *v.* TODD, BURNS, & CO. (1).

Feb. 28.

Practice—Discovery of documents—Party resident abroad—Agent residing within the United Kingdom—Form of order—R. S. C., I. (22*nd February*, 1905)—*Order XXXI., R.* 12.

In an action brought by a firm carrying on business abroad to recover the price of goods ordered through their agent in the United Kingdom, the defendants moved for discovery of documents:—

Held, by Kenny, J., that the order should be made against the plaintiffs with liberty to their agent in the United Kingdom to make discovery on their behalf.

The plaintiffs, a firm carrying on business in the United States under the style of Donovan & Co., brought an action to recover the price of certain goods alleged to have been ordered by the defendants. The plaintiffs alleged that the order was given to their agent, one Luxemburg, whilst he was in Dublin. Luxemburg ordinarily resided in London, and acted as agent in the United Kingdom for the plaintiffs.

P. A. O'C. White moved on behalf of the defendants for discovery of documents.

Kenny, J.:—

I do not think that I have jurisdiction to order Luxemburg to make discovery on behalf of the plaintiffs; but I shall order the plaintiffs to make discovery, with liberty to their agent, Luxemburg, to make the necessary affidavit on their behalf.

Solicitors for the defendants: *Scallan & Co.*

J. C. W.

(1) Before Kenny, J.

THE KING (HEWSON) *v.* THE COUNTY COUNCIL OF WICKLOW AND THE RATHDOWN No. 2 RURAL DISTRICT COUNCIL (1).

K. B. Div. 1907. April 19, 22, 23. June 10.

Local Government—Road—Liability of County Council to repair—Evidence of road being maintainable by county—Presentment for repair by Grand Jury—Resolution for repair by County Council—Expenditure on roads—Authorized limit exceeded—Mandamus—Demand and refusal—County Council—Rural District Council—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *ss.* 4, 27, 82.

The fact that a Grand Jury passed a presentment for the repair of a road, or that the County Council passed a resolution for, and expended money on, such repair, is not conclusive evidence that the road is a public road maintainable by the county.

A mandamus will not be granted directing a County Council to expend money on the repair of a road where the effect would be to compel the expenditure on roads of a sum in excess of that permitted by sect. 27, sub-sect. 2, of the Local Government (Ireland) Act, 1898.

An application had been made on behalf of H. to a Rural District Council to repair, and keep in repair, a road, and to build a wall to protect it from the sea, which application had been refused by the Rural District Council. H. subsequently obtained a conditional order for a mandamus, directing the County Council and the Rural District Council to put the road in repair, the claim to have the wall built being abandoned :—

Held, that there had not been such a demand and refusal as would entitle H. to the mandamus sought for.

Held, also, that the mandamus sought against the County Council should be refused on the further ground that no proposal had been submitted, or application made, to them.

MANDAMUS. The prosecutor was the owner of a house close to Greystones, county Wicklow, known as Jubilee Castle. The only approach to the house was by a road or track (hereinafter referred to as "the road"), about 78 perches in length, leading from a public road to Jubilee Castle. The road ran close to the sea, and was not fenced on the sea side. Both Jubilee Castle and the road were situate in the Rathdown No. 2 Rural District, in the county

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

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of Wicklow. The road was also the only mode of access to some other houses, mostly small cottages. Jubilee Castle had been built in the year 1897 by the prosecutor. He had obtained in December, 1896, a lease of a limekiln and plot of ground adjoining the road, and in the year 1897 had converted the lime-kiln into the house known as Jubilee Castle.

From affidavits filed to obtain the conditional order it appeared that prior to the year 1897 the Board of Guardians of the Rathdown Union had laid a public water main along the road with a public fountain which was kept in repair by the District Council. At the Presentment Sessions held at Enniskerry on the 11th December, 1897, the prosecutor had obtained a presentment to keep the road in repair for one year. At the request of the prosecutor, a Mr. Vandeleur, a member of the Rathdown No. 2 Rural District Council, made an application to the Rural District Council at their meeting held on the 7th January, 1907, to repair and keep in repair the road, and also to build a protective wall at a total cost not exceeding £111 14*s*. There being no seconder, the application was refused. On the 23rd January, 1907, the prosecutor served notices on the secretary of the Council and the clerk of the Rural District Council, calling on those respective councils to place and keep the road in good condition and repair. It was alleged that as the road was in close proximity to the sea, it was exposed to exceptional wear and tear, and some outlay on a retaining wall was urgently required if the road was not to be severely damaged by the sea, and that unless the road was properly protected a high north-east gale with a high tide would cause the sea to wash away a large portion of the road.

The prosecutor obtained a conditional order for a writ of mandamus, directed to the County Council of Wicklow and the Rathdown No. 2 Rural District Council, commanding them and each of them forthwith to put the road into good condition and repair; and, if necessary for that purpose, that the Rural District Council should formulate a proposal pursuant to the Local Government (Procedure of Councils) Order, 1899; and that the Wicklow County Council should assess and levy a rate upon the owners of all rateable property within the Rathdown No. 2 Rural District, and that they and each of them should take all other steps (if any) necessary for the purpose.

A number of affidavits were filed by way of cause against making the conditional order absolute, made by, amongst others, the secretary to the County Council, who had formerly been secretary to the Grand Jury, the chairman and the secretary of the Rural District Council, and the county surveyor, and the assistant surveyor of County Wicklow, which affidavits contained allegations to the following effect: That the building of Jubilee Castle was completed in the summer of 1897, and that at that time no county money had ever been expended on the road. That the first application ever made to the Grand Jury to repair the road was in the year 1892 by a Mr. Arthur Hughes, and that this application was refused on the ground that the road was only a track along the sea-shore to the unused limekiln. That the application for the presentment made in December, 1897, was an application to have the road repaired and maintained for a period of five years under sections 50 and 52 of the Grand Jury Act, 1836. That the application was treated as an application in reference to a new road and to a contract for one year, but that the requirements of section 55 of the Grand Jury Act, 1836, as to presentments for new roads, had not been complied with. That the Grand Jury did not treat the road as a public road to be maintained, but granted the application as a temporary repair only. That it was only as a compromise it was granted, and that it was arranged that the county would not maintain the road, as it was a private road leading nowhere, and that those interested in it might maintain it. That a contract on this basis was taken to repair the road and keep it in repair for one year. That this was a contract not for the maintenance of the road, but for the purpose of temporary repair. That the abstract of presentments granted at the Spring Assizes, 1897, which included all the public roads then in existence, did not contain any reference to the road in question. That the Grand Jury never looked upon the said road as a necessary or a public road or as one maintainable by them. That in the year 1900 the County Council passed a resolution and entered into a contract for the temporary repair of the road for nine months expiring on the 31st March, 1901. That in the notice to contractors the road was under the heading "special work," showing that it was not on that occasion treated as a county

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road, and that the contract was for temporary repair. That in the year 1905 at the request of the prosecutor a proposal for the repair of the road was brought forward at a meeting of the Rural District Council, and was rejected on the ground that the road was not a public road maintainable by the county. That the road was never at any time under maintenance by the Grand Jury or by the County Council; that it was a *cul de sac*, and had always been a private road for the convenience and use of the owner of the houses, and was not at any time a public road, nor was it ever taken over by any road authority. That it was really part of the La Touche estate and not public property, and was practically a part of the beach; and reference was made to maps and the memorial of a lease in support of these statements. That the waterpipe was laid along the road, and the fountain erected, in consequence of an *ad misericordiam* appeal made by the prosecutor (who was one of the Poor Law Guardians) on behalf of the fishermen occupying the cottages on the road. That the application made on behalf of the prosecutor to the Rural District Council was made with the object of getting the Council, at the cost of the ratepayers, to build a sea wall to protect his private property from the action of the sea, which was steadily encroaching. That the cost of such a wall would be about £2000 in the first instance, and that the periodical repairs would be a heavy burden on the ratepayers. That the limit of expenditure provided by section 27 of the Local Government Act, 1898, for Rathdown No. 2 District, on road contracts was £1711 5*s.* per annum; and the actual liability on foot of contracts and works which must be paid for out of funds during the financial year beginning the 1st April, 1907, was £1685 12*s.* 4*d.*, leaving a balance of £25 12*s.* 8*d.*, which would be wholly inadequate to repair the road (1); and that the Local Government Board had refused to extend the limit.

Affidavits were filed in reply, alleging that the road had been a county road leading from Greystones to Windgates, until a storm carried away part of it; and denying the alleged arrangement in connexion with the presentment in 1897. It

(1) It was alleged during the argument by counsel for the County Council that there was a mistake in these figures, and that, on the accounts, it appeared there was not even this balance.

was also alleged that a sufficient protecting wall could be built for £200.

Bourke, K.C., Conner, K.C., and *Edward Murphy*, for the prosecutor.

Sullivan, K.C., Molony, K.C., Kough and *O'Neill*, for the Rathdown No. 2 Rural District Council.

O'Brien, K.C., and *James O'Connor*, for the County Council of County Wicklow.

June 10.

LORD O'BRIEN, L.C.J.:—

Mr. Thomas Hewson seeks to obtain a writ of mandamus to compel the County Council of Wicklow, and the Rathdown No. 2 Rural District Council, to put in good condition and repair a certain so-called road in the said county. Mr. Hewson's application has been resisted on many grounds by the respective councils. They say—

1. That the so-called road is not a public road maintainable by the county—is not at all within the ordinary meaning of the expression "public road."

2. That there was no such demand by the prosecutor to do what is now sought at the Bar, and refusal of such demand by the respective councils, as would justify the issue of a writ of mandamus.

3. That under the circumstances of the particular case the issue of a mandamus is not *ex debito justitiae*. That we have a discretion as to whether we should order a mandamus to issue, and that in the exercise of a sound discretion we should not grant the writ, inasmuch as, having regard to the moneys available by the road authorities, doing so would be an ineffective proceeding, and would in any case lead to confusion and embarrassment in the management of the county roads, and lead to public prejudice.

4. That in no case should a writ be issued against the County Council, inasmuch as no proposal was formulated and submitted to them to put the so-called road in good condition and repair.

These are practically the grounds upon which the application in this case is resisted.

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Lord O'Brien, L.C.J.

The largest and most important question is presented by the first ground, namely, that the so-called road was not a public road maintainable by the county. A road maintainable by the county comes within the definition of public work. I most certainly am very strongly of opinion that we should be very clearly satisfied that what is asserted to be a road maintainable by a county fulfils that description, before we interfere with the road authorities of a county. This is not like *The Clare Case* (1), where the road referred to was admitted to be a public road maintainable by the county, but was suffered to get into a state of disrepair by the road authorities. The question here is, whether the road in question is at all within the definition of a public work; and it appears to me, where there is no want of *bona fides* alleged, to be assuming a very great responsibility to insist upon the repair, and keeping in repair, as a road, of that which they honestly believe is not a road. I say with great deference that I think the road authorities, acting with a due sense of responsibility, are much more likely to be right than those who are immediately interested in having a road leading by or up to their residence. Not that I would for one moment impute any want of *bona fides* to the prosecutor in this case; but people often too readily believe what they wish to believe—the wish is father to the thought. In my opinion the only difficulty which may be considered to exist—a difficulty which does not exist in point of fact with me—in reference to this first question, as to whether the so-called road is in fact a road, is the presentment of the Grand Jury and the order of the Council, which were passed. I shall deal with these later on.

Now then as to this first question—road or no road—I ask, when did the so-called road become a road? Surely every public path across a mountain is not a road maintainable by the county? Surely every boreen, where a public right to pass and re-pass exists, is not necessarily a road maintainable by the county? I think there is great good sense in the observation made by my brother Andrews in the case of *The Leitrim Presentment* (2). It would indeed be a great burthen to a county if every public pathway or track where the public have a right to pass and

(1) [1904] 2 I. R. 569, 579.

(2) 28 Ir. L. T. R. 139.

re-pass was maintained by the county. But when did the so-called road in question become a road? There were no houses at all in the neighbourhood, except a few cottages, until Jubilee Castle was built. It is suggested that some old inhabitants, who are not named, said that there was a public way across to Windgates; but this is altogether too vague. Take the maps in the case. On the map on Mr. Hewson's lease—we have not seen, I much regret, the lease itself—but on the map there is no road or passage whatever shown; nor on the map which represents the holding of a Mr. Jones is there anything of the nature of a roadway or track. The beach is flush with these holdings; and it is an important circumstance that in the lease from La Touche to Jones, of April, 1863, the premises are described as bounded on the east and north-east by the sea-beach. There is not, so far as I can ascertain, one scrap of documentary evidence to sustain the allegation that there was a road. There is no evidence whatever of any actual dedication by the owner in fee of this place as a public road. No doubt from long and clear user dedication will be presumed, even though the place be a *cul de sac*, but there is no such evidence, in my opinion, here; and the only documentary evidence as to the landlord's title that was referred to, shows that Mr. La Touche, the landlord, was only tenant for life. It must also be never lost sight of that, when in 1892 Mr. Hughes made an application to the Grand Jury for the repair of the road, it was refused. See paragraph 5 of Mr. Wynne's affidavit. He says in so many words that the first application ever made to the Grand Jury to repair the said road was in the year 1892, by Arthur Hughes, and that the said application was refused, and that no further step was taken until Mr. Hewson made his application. The whole of the 5th paragraph is very important. I had better read it: "I am informed by Mr. Charles P. O'Neill, solicitor for the said Rural District Council, and believe, that in the month of December, 1896, the said Thomas Hewson obtained from Mr. Francis La Touche a lease of a lime-kiln and plot of groun dadjoining the said track, passage, or road; and I am informed by Mr. John Pansing, Assistant County Surveyor for the Rathdown No. 2 Rural District, and believe, that in the summer of the year 1897 (Jubilee year) the said Thomas

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Hewson converted a lime-kiln, adjoining the said track, passage, or road, into the present dwelling-house known as Jubilee Castle, and that said dwelling-house was completed in the summer of 1897, and that at the time no county money had ever been expended on this road. I say that the first application ever made to the Grand Jury to repair the said road was in the year 1892, by Mr. Arthur Hughes, and that the said application was refused. I say no further step was taken from that time until Mr. Thomas Hewson himself made the application already referred to." The affidavit sets out the application referred to, as follows:—

"Contracts for one year.

"5. To repair and keep in repair for one year 190 perches of road between the three roads at Mr. La Touche's back gate, and three roads on Kilmurray, at 5*s.* per perch. Christopher Fox, and George Earle. 6. Like 60 perches between the life-boat house, and Mr. Jones' lime-kiln at Greystones, at 5*s.* per perch. Arthur Hughes and Patrick Doyle." The affidavit then proceeds to state that these applications were struck out by Mr. Carter Draper, the County Surveyor, "because the Presentment Sessions refused to grant them on the ground that they were unnecessary, the latter being only a track along the sea-shore to the unused lime-kiln."

In connexion with this paragraph of Mr. Wynne's affidavit, the second and third paragraphs of the affidavit of Mr. Gallagher, the present County Surveyor, should be read as to the real characteristics of the passage. They are as follows:—

"2. I am well acquainted with the by-road or passage referred to in the said affidavit of the said Thomas Hewson. The said alleged road runs from a public road at the railway bridge at Greystones parallel with the railway line up to the house where formerly stood an old lime-kiln, and where the said Thomas Hewson now lives in the premises which he has called Jubilee Castle. The said alleged road is, in fact, practically a part of the beach. It is not fenced in on the sea side. Its length from the railway bridge, where it adjoins the public road, to Jubilee Castle is about 78 perches. It is almost level with the beach in places, or nearly level therewith, and has no defined boundary.

It leads to nowhere except to said Jubilee Castle, and ends on the sea-shore. Besides Jubilee Castle there are some cottages to which it also furnishes a means of access, and these houses are mostly labourers' cottages.

"3. The said road has been used by persons walking thereon to Jubilee Castle or taking a walk from Greystones across Bray Head, and it is well known there is no right of way across Bray Head, same being stopped once a week to prevent any right of way being acquired over same. The said alleged road may also have been used for carts going down to the beach for the purpose of taking gravel therefrom. I am informed, and believe, that the inhabitants of the district endeavoured some few years ago to assert a right to dig and cart away gravel from the foreshore which bounds the said alleged road; but Mr. La Touche, the owner of the property there, went to law with them, and got an injunction to prevent them doing so, and he and his licensees are the only persons now who have or exercise the right of taking gravel from the foreshore. The said alleged road is really part of the La Touche estate, and is not public property at all, and the public generally have no right whatever of access over same."

Before Mr. Hewson's time I think the user of the place, the character and requirements of the district, and the physical characteristics of the alleged passage, plainly negative that this so-called road was in fact a road.

I now come to Mr. Hewson's time, and to the presentments—the presentments of the Grand Jury and of the County Council. It is said that the Grand Jury was but clay in the hands of the potter—that they were very yielding under the influence of a very pleasing—of, I may be permitted to say, a very engaging—personality, and that they did grant something under the malleable influence of the moment, but that they did not by the presentment they made intend to assert that the so-called road had been hitherto a road; that what they did grant was some small—very small—sum for temporary repairs, and that they never intended to place the so-called road within the category of county roads to be maintained for the future at the expense of the county. That in fact the Grand Jury contributed a small sum to give the inhabitants a start, but that all future maintenance should be at their expense.

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That what took place before Presentment Sessions, Grand Jury, and again before Rural District Council, was the sanctioning of a mere temporary repair; and that the so-called road was not really ever taken in charge as a public road to be permanently maintained by the county.

I think the affidavits of Mr. Wynne and Mr. Pansing, and the documents they refer to, show this. The presentment and the order of the Rural District Council, having regard to the small sums, short time with which they were conversant, and all the documents referred to in them, and the circumstances under which they came to be made, so far from satisfying me that the so-called road was dealt with as a public road to be permanently maintainable by the county, have really the opposite effect, and, so far from assisting the prosecutor, when all the circumstances are considered really make against him.

I think special weight should be attached to the affidavits of Mr. Pansing and Mr. Wynne, having regard to their respective positions. Want of *bona fides* was not imputed to them, nor was any reflection made on their integrity. I think we should not in this connexion also lose sight of the fact that in 1892 the application to the Grand Jury of Mr. Hughes was refused. The action of the Grand Jury and Rural Council as regards temporary repairs was in my opinion irregular; and all public bodies should remember that irregularities are apt to come home to roost.

But in any case the presentment by Grand Jury, or order of County Council, has not the effect of a judgment. They create no estoppel. Even if the presentment was subject to no impeachment or criticism of any kind, and purported to be made for the maintenance of what was alleged to be a public road maintainable by the county, it would be only evidence to show that the so-called road was alleged to be a public road: see *Braddel's Case* (1) referred to by Mr. Molony, and also the case of *The Giants' Causeway* v. *The Attorney-General* (2). See especially what Lord Justice FitzGibbon says in the case of *The Giant's Causeway* v. *The Attorney-General* (2), at page 313 of the report. The effect of a presentment could not be more succinctly put; and Lord Justice

(1) Unreported. (2) 5 New Ir. Jur. Rep. 301.

Holmes said in the same case at page 320 of the report, when referring to the effect of the nature and importance of a presentment, that the value of such might be great or small according to circumstances. I think under all the circumstances before us the evidence derivable from the presentment and order of the District Council was of a most attenuated character. It may be giving too much rein to what may be alleged to be a peculiar idiosyncracy, but in my opinion the presentment of the Grand Jury, and order of the Rural Council, such as they were under all the circumstances connected with them, rather told against, than in favour of, the prosecutor's contention.

I am of opinion that this so-called road was not a public road maintainable by the county, or in any sense a public road within the ordinary meaning of that expression.

I come to the second point—Was there an adequate demand and refusal? I think not. What was sought by the conditional order, and ultimately was pressed for at the Bar, was an order to put the so-called road in good condition and repair, irrespective of the construction of a wall to protect against the encroachment of the sea. This, in my opinion, was not really demanded. What was demanded was to put the so-called road in good condition and repair, and for that purpose to erect a retaining protective wall. I am not at all sure that the real object was not to procure the construction of a retaining or protective wall. See paragraphs 14 and 15 of Mr. Hewson's original affidavit, and paragraph 5 of Mr. Wilmot's affidavit. But however that may be, there was not in my opinion a demand for mere repair, and keeping in repair, as distinct from repair and keeping in repair and the construction of a protective wall.

Thirdly, I think we should not grant the mandamus, as any order we would make would be ineffective. There would be no funds to give it effect, as appears from the affidavit of Mr. Gallagher, the county surveyor of the county of Wicklow. He says in paragraph 7 of his affidavit as follows :—" I say that the limit of expenditure provided by sect. 27 of the Local Government Act, 1898, for Rathdown No. 2 per annum on road contracts is £1711 5*s*. The actual liability on foot of contracts and works which must be paid for out of funds during the financial year,

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beginning 1st of April, 1907, is £1685 12*s.* 4*d.*, leaving a balance of £25 12*s.* 8*d.*, which would be utterly inadequate to do the road or passage in question. Some time ago the Local Government Board wrote refusing to extend this limit in Rathdown No. 2; and this refusal had reference to another road which the District Council wished to make. Even if the District Council had formulated the proposal, the County Council could not be obliged to sanction it, and would have to throw it out on the aforesaid grounds that it exceeded the limit of expenditure, and it would have been my duty to prevent them giving their sanction to the said expenditure under the Procedure of Councils Order, 1899."

Indeed, in the exercise of our discretion, I think we ought to refuse this application as, having regard to the inadequacy of the funds sanctioned by the Local Government Board in relation to roads, any attempted application, distribution, or re-distribution of them with reference to the so-called road in question would be calculated, under the circumstances of the present position, to create great confusion, embarrassment, and public prejudice.

Fourthly, As to the last ground of resistance to this application, that is to say, that in no case should an order be made against the County Council because no application of any sort was made to them, I think this ground of opposition is also well founded, because as far as I can ascertain there was no demand or application of any kind made to the County Council; certainly there was no proposal duly formulated and submitted to them.

On the whole case, I think the order for a mandamus should be refused, but under all the circumstances, and especially having regard to the action of the Grand Jury and Rural Council in relation to the presentment and order made by them respectively, without costs.

GIBSON, J.:—

This application for mandamus is based on section 82 of the Act of 1898, which, converting the County and District Councils into Corporations, is said to impose on them an absolute and unqualified obligation to repair and keep in repair the alleged road between Greystones and Jubilee Castle. *Westropp's Case* (1)

(1) [1904] 2 I. R. 569.

is relied on as an authority. There, however, none of the objections made against the present application were discussed or decided. These objections are as follows :—

1. (*a*) The road never was legally dedicated to the public or accepted by the county as a public road ; (*b*) The presentment of 1898, and special outlay by the County Council in 1900, were *ultra vires* and illegal, as the road was not then a public highway. The presentment was also invalid because it purported to be for a new road, and the conditions of the Grand Jury Act as to such new road were not satisfied. Even if legal, the presentment was made and accepted on the faith that the future maintenance of the road should not be borne by the county. The expenditure by the County Council in 1900 was under the head of "special works," was limited to nine months, and was provisional, temporary, and irregular. At most these transactions were evidence only, and are under the circumstances of little weight.

2. The application to the District Council was one and entire, requiring the repair of the road and the erection of a sea wall, which was essential for the efficient maintenance of the road. The sea wall is now given up, and there has been no demand and refusal of the application in its present modified form. The letters of applicant's solicitor of January 11th, and of applicant, 23rd January, 1907, did not disclaim any part of the original application, and in any case were made at a time, and under conditions, making consideration and effective decision impossible.

3. The District Council are entrusted with responsible administrative duties ; and as they acted in good faith, and with due regard to their financial duties, the Court ought not by mandamus to compel them to make an expenditure which, on the materials before them, they reasonably thought could not be justified and might be surcharged.

4. There were no available funds. Section 27, sub-sect. 2, makes effective compliance with mandamus impossible, and the prerogative writ ought not to be issued on the bare chance that the Local Government Board (which has already refused a similar application) would consent to increased expenditure ; nor should the writ be allowed to enable the applicant under sections 80 and 81 to compel appropriation of county funds

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required for other purposes, thereby throwing county finance into inextricable confusion.

5. The applicant is personally disqualified by reason of his attitude at Presentment Sessions in 1897.

6. Under no circumstances can mandamus be awarded against the County Council, whose powers, functions, and discretion are specifically prescribed by the Act and Orders thereunder. They have never refused to perform any duty that they had legal ability to discharge. The initiative rests with the District Council, taking the place of Presentment Sessions; and the County Council cannot be compelled to put the work in charge of the county surveyor under Order of 30th January, 1899, art. 25, sub-sect. 5, etc. The Council is a supervising and controlling, not an original, authority, and should not be superseded in their function by mandamus when their action is *bonâ fide*. In any case the application of January 23rd last was made when consideration and decision were out of the question.

The above objections are weighty and merit careful consideration.

1. At common law, highways were repairable by the parish, which, for breach of that duty, was indictable. To constitute a public road, dedication by the owner of the soil in fee was essential, and apparently also acceptance by the public: *Fisher* v. *Prowse* (1); *Cubitt* v. *Maxse* (2); *Mercer* v. *Woodgate* (3). Mere user by the public was not conclusive as to such acceptance: *Reg.* v. *Southampton* (4). With regard to expenditure by the parish, it was held, as far back as 1833, that it only raises a strong presumption that the road was a public highway, but that such expenditure was not conclusive that the road was such a public highway; nor did the refusal by the parish to adopt it prevent its being so. The Act 5 & 6 Wm. 4, c. 50, s. 23, contained special provisions protecting the parish from the burthen of maintaining new highways, it being obviously unjust that an owner by dedicating a road should be able to impose an onerous and perpetual obligation on the parish, the dangerous character of which is illustrated by *Reg.* v. *Greenhow* (5).

(1) 2 B. & S. at p. 780. (2) L. R. 8 C. P. at p. 714.
(3) L. R. 5 Q. B. at p. 31. (4) 19 Q. B. D. 590. (5) 1 Q. B. D. 703.

Under the Grand Jury Act there was no remedy by indictment or mandamus, and the Grand Jury had an absolute discretion, in case of ordinary high-roads, whether they would or would not spend money on a road. The action of one Grand Jury in presenting, or refusing to present, did not bind their successors. The only control over them was the appeal given by section 64, which is reproduced with modifications in section 82, sub-sects. 3 and 4, of the Act of 1898. There was no jurisdiction to present unless the road was public, and a presentment is not therefore more than evidence of a presumptive character. The question now raised is, whether the new statutory corporations, replacing the Grand Jury and Presentment Sessions, are subjected by section 82 to an absolute and practically perpetual obligation to maintain, regardless of expense, all public high-roads, including country lanes, which anyone has dedicated or may see fit to dedicate. No such obligation existed under the Grand Jury Act or English Statute Law.

Section 82, whatever its effect may be, only applies to public roads. Our first inquiry must be, Was this a public road? The history, nature, and user of the alleged road are left in an extremely unsatisfactory state. It is described by defendants' witnesses as having been no more than a foot-track running along the sea-shore. It lay on the selvage of the La Touche estate, next the beach, and had no fence on the sea side. It is easy for witnesses to confound the present user with the past, and the old photograph is in striking contrast with the present-day picture. One affidavit (Farrell's) states that the road formed a direct communication between Greystones and Windgates, and was maintained by the county till recently. The latter part of this statement is plainly erroneous, as there is no trace of any presentment before that of 1898; and I find it impossible to believe that, in addition to the public highway, directly connecting Greystones and Windgates, there also existed a roundabout sea road repairable by the county. The portion between Jubilee Castle and the railway bridge is said to have been washed away some years ago—when is not stated—and the road now ends at Jubilee Castle, extending over 78 perches. The earliest document in the case, the memorial of the lease, 25th April, 1863, to Jones

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for 120 years—a term apparently still in existence—tells strongly against the existence of any public road at that time. It treats the sea-beach as the boundary, just as Mr. Hewson's own map in 1896 does. The lessee could not of course dedicate: *Corsellis* v. *London County Council* (1). It was the interest of the owners of the La Touche estate, if they could, to get the track used by their tenants adopted by the county. But if there was no highway dedicated to the public when Mr. Hewson took his lease in 1896, it is very doubtful whether, apart from the difficulty as to the premises in lease from 1863, there was anyone representing the fee who could dedicate afterwards. The state of the La Touche title is not proved. The next date is the refusal of the Grand Jury in 1892 or 1893 to present. The application at Presentment Sessions was for 60 perches only—not 78—from the lifeboat house to Mr. Jones's lime-kiln in Greystones. In December, 1896, Mr. Hewson obtained a lease of the lime-kiln, since converted into Jubilee Castle. This document is mentioned in the statement of claim in *Hewson* v. *La Touche* (2); and I infer from it that the lessor, Francis La Touche, was then a limited owner. If at that date there was no dedicated public highway of the character alleged now to exist, extending to and from the site of Jubilee Castle, it would not be right, without knowing more of the state of the La Touche title, to make the order absolute.

The water supply given under the Public Health Act is of no importance; it was granted in response to an *ad misericordiam* appeal made by Mr. Hewson (who was one of the Poor Law Guardians) on behalf of the fishermen.

The main topic pressed was the presentment of 1897, which was for twelve months, and extended to 78 perches—not 60 perches, as in the former application of 1892. This presentment was passed on the recommendation of Presentment Sessions, which, it is alleged, acceded to the application on the understanding that the future upkeep of the road was to be at the expense of those using it. Supposing that the words "new road" described not a new road proper, but a road not previously paid for out of the

(1) [1907] 1 Ch. 704. (2) Unreported.

public rates, still looking at the brief period of the contract, and the character of the road, I find it difficult to suppose that the evidence of the county officers as to the alleged understanding is either an invention or hallucination. However, I do not decide the case on this ground. If the road was not a public highway, the presentment cannot make it so. The circumstances surrounding this presentment deprive it of a good deal of its evidential value.

The next matter relied on was the expenditure by the County Council in 1900, under contract with Fox, for nine months, under the head of "special work." If the road was not then a public road, the expenditure, like the presentment of 1898, was illegal. It is suggested that on its face this expenditure was of a provisional and temporary nature, and cannot be considered as sufficient proof of county responsibility to maintain the road for ever, at all costs, as a recognized highway legally dedicated. The storm of 1901 swept away a considerable part opposite Jubilee Castle, and Mr. Hewson constructed a sea-wall there at his own expense. In 1905 an application was made for repair of 70 perches of this road. This was rejected.

Taking the whole case, the uncertainty of any real dedication of what was in its origin an accommodation road for the advantage of the La Touche estate, the vagueness of the user, the lease of 1863, and the map on Mr. Hewson's own lease, the Court would not be warranted in issuing the prerogative writ.

2. Assuming that the road was a highway to which sect. 82 applies, was there such a demand and refusal as our practice required?

Section 27 of the Act substitutes the District Council for Presentment Sessions; and the authority and duty of the County Council are governed by the Order of the 30th January, 1899: Vanston, page 1377. Mr. Vandeleur brought forward at the meeting of the District Council, on January 7, 1907, an application to repair and keep in repair the 78 perches at 3*s.* per perch, and also to build a protection wall (which would be a new work under Order 30th January, 1899, Article 15, sub-sect. 5) at £1 per yard, the total cost not exceeding £111 14*s.* This proposal was rejected practically unanimously, there being no seconder. It is

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admitted at the Bar that so far as regards the sea-wall the Council were within their rights, but it is argued that this portion of the application was severable. In the affidavits in support of the present motion, however, it is distinctly put forward that a protection wall is essential, if the road is to be maintained in proper condition: see Mr. Hewson's affidavits, 25th February, paragraphs 14, 15; and 21st March; Wilmott's affidavit, 25th February; ditto, 18th March; and Heron, 18th March The defendants' witnesses agree with this view: see affidavits of Gallagher and Pansing. I am convinced that without such a sea-wall (which would entirely change the character of the track) there would be continually recurring and useless expense. No doubt if the actual ground on which the road ran was washed away and destroyed, all liability would cease. But, so long as the road remains as a repairable entity, the obligation remains and must be performed: *Reg* v. *Greenhow* (1). It being admitted that the application for a sea-wall was unsustainable, was it an integral part of the application? I think it was, and was so intended. The District Council was therefore reasonably justified in refusing; they were not asked to consider the more limited application made at the Bar. Two further applications were sent; one on Jan. 11, by Mr. Hewson's solicitor, and one on Jan. 23, by Mr. Hewson to the District and County Councils. It does not appear whether the Councils were sitting at the time. An application must be made at a time when the Council can act. The nature of the application made a full and deliberate consideration by the Councils essential. They were not to be "hustled" (to use an American phrase). None of these applications disclaim the protection wall. On the whole, I think that there has been no such demand and refusal as to support the present motion.

3. The next objection, No. 3, I need not dwell on. The District County Councils are representative bodies, entrusted with responsible administrative functions; they adjust the competing claims on the limited funds at their disposal. Section 82 contains remedial provisions as to friction between the superior and inferior corporate bodies, but is silent as to individual complaints. Man-

(1) 1 Q. B. D. 703.

damus is no doubt in a fitting case available, as was decided in *Westropp's Case* (1); but the jurisdiction requires care and prudence in its exercise, lest county administration should be thrown into confusion.

4. The fourth objection rests on section 27, sub-sect. 2, which puts local finance as to public works into a kind of a strait waistcoat—to be relaxed only by the Local Government Board. The limit of local expenditure has been reached. Assuming that the trifling balance stated in the affidavits exists in fact (and it is said that it does not, as there was a mistake in the figures), it would be barely sufficient to meet urgent and unexpected casualties. Can or ought the District or County Council to be compelled by mandamus, contrary to their own judgment, to apply for such consent? Should the prerogative writ be issued on the chance of the Local Government Board allowing the statutory limit to be exceeded? Want of ability to comply with mandamus, if allowed, is a good answer to an application for the writ: *Bristol Railway Case* (2). In *Westropp's Case* (1) none of these difficulties were raised or considered. This fourth objection, having regard to sections 80 and 81, may be possibly said to be more of an appeal to discretion than a legal defence. Section 80 must, however (as was held by this Court in *Vance's Case* (3)), be read as subject to section 47, sub-sect. 2. The section includes judgment. Funds specifically dedicated to particular purposes or trusts cannot by means of a judgment be made applicable to other and different purposes: *The Attorney-General* v. *Newcastle* (4); *The Attorney-General* v. *De Winton* (5). A judgment can only reach funds lawfully applicable to satisfy it: it does not produce *confusio bonorum*, or compel one trust fund to supply deficiencies in another. Whether this implied limitation would apply in this case of a prospective budget estimate for roads may be, however, a somewhat different question.

It is urged that the District Council cannot be allowed, by denying the status of the road as a public highway, to prevent the matter from being brought before the County Council, and thereby

(1) [1904] 2 I. R. 569.
(2) Q. B. D. 10.
(3) Unreported.
(4) 23 Q. B. D. at p. 497.
(5) [1906] 2 Ch. 106.

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preclude the possibility of application to the Local Government Board. The applicant may, however, try a suit to obtain a declaration, &c., if he thinks such suit maintainable. The County and District Councils are representative assemblies to govern local affairs; and the Court ought not, without strong facts, to overrule them when acting honestly in course of duty on a matter which is not so much a point of law as one of business administration in relation to limited fiscal resources. The remarks of Lord Russell in *Kruse* v. *Johnson* (1) in reference to by-laws indicate a valuable principle.

5. On the supposed personal disqualification of the applicant by reason of what is alleged to have taken place at Presentment Sessions in 1897, I am not willing to pronounce any concluded opinion as to whose memory is at fault. The presentment, however, was made, I think, under peculiar and exceptional circumstances.

6. The last point raised was that the County Council could not be ordered to do what is asked. Their duties are defined and restricted. Section 4, which was relied on by the applicant, was fully considered in the *Dungarvan Case*, but the decision of this Court was not reported. The section is prefaced by the words "subject to the provisions of this Act." Section 27 and other sections, with the Orders thereunder, show that the jurisdiction of the Council is not original. They have no initiative save under special provisions such as the Order of 30th January, 1899, Art. 25, sub-sect. 2, which enables them in a certain contingency to put work into the charge of the county surveyor "if they see fit." The Council has never refused to do anything which it could lawfully have performed. The application of January 23, 1908—if the Council was not then sitting—was illusory. If it was sitting, the letter of January 23rd demanded action which could not legally have been taken on the facts as they then stood. Section 82, in terms, makes the duty imposed depend on the respective powers of the two bodies. I know of no actual decision as to the exact relative position of the County Council and District Council. In *Westropp's Case* (2) the road was admittedly public, and no distinc-

(1) [1898] 2 Q. B. 91. (2) [1904] 2 I. R. 569.

tion of liability between the two Councils was or could be taken; the road was under contract.

I decide that on the whole case the application against both Councils must be refused, but having regard to the presentment of 1898, and the conduct of the Council in 1900, without costs.

KENNY, J.:—

I agree in thinking that we should discharge the conditional order. The section of the Local Government Act (1) which casts a duty on the local authority to maintain all public works, is as follows:—

"It shall be the duty of every County and District Council, according to their respective powers, to keep all public works maintainable at the cost of their county or district in good condition and repair, and to take all steps necessary for that purpose."

The works, according to this section, in respect of which the duty to repair is imposed, must, therefore, fulfil two conditions—(1) They must be "public works," and (2) they must, from their antecedents or nature, be works that are properly maintainable at the cost of the county or district. The road in question is one which unquestionably must at no distant period have formed portion of the sea-beach. In a lease of the 9th April, 1863, a piece of ground adjoining this road which was demised to a person named Jones, is described as bounded on the north and east by the sea-beach; and the map on Mr. Hewson's lease of December, 1896, shows no trace whatever of a road, although the map prepared for his application of 1897 to the Grand Jury, purports to give the road as portion of his eastern boundary. The road is a *cul de sac*. Reliance is placed on the circumstance that some years ago the sanitary authority laid down a water-pipe along the road, and that, in 1898 and again in 1900, contracts for its repair were entered into—in the former year by the Grand Jury—in the latter year by the Rural District Council. The water-pipe was laid at the urgent solicitation of Mr. Hewson and the other occupiers of dwellings facing the sea-beach. The repairing contracts were for one year, and nine months, respectively; and it is

(1) Section 82, sub-section 1.

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alleged that the presentment for the former was the result of considerable pressure, and that the county surveyor having reported that there was no road in existence, there was an understanding at the time that the Grand Jury were to be under no permanent liability for the repair of what was, in substance, a new road. This alleged understanding is denied by Mr. Hewson. It further appeared that in 1892 an application for a presentment in respect of this alleged road had been refused. In these circumstances it is contended that the road is a public work, and that it was taken over by, and was consequently maintainable by, the county. It is admitted by the Councils that there was no power to make a presentment or pass a resolution unless for a public work; and they say that the Grand Jury and Rural District Council acted in error in passing the presentment and resolution, and in adopting the contracts for repair. But they contend that such presentment and resolution are not conclusive either that the road is a public work or that it has been taken over by the county. I entertain very great doubt as to whether this road is at all a public road within the meaning of the Local Government Act. There is no evidence before us of any dedication of it by a person competent to dedicate; and it seems to me that, unless in the form of a track or path along the beach, it was non-existent in 1896. But, whether it had the characteristics of a public road or not, I am of opinion that it cannot be said to have been conclusively taken over by the county as a public work to be permanently maintained at the expense of the county. The presentment of 1898 and resolution of 1900 are not of such a nature as to determine the question. The making of a presentment is not necessarily an out-and-out adoption by the Grand Jury of the particular work: *The Giant's Causeway Case* (1); *Braddell* v. *County Council of Tipperary* (2). It is evidence of adoption—but only evidence, the effect of which may be counteracted by the circumstances. The present case seems to me to afford a strong illustration of the danger of conclusively binding the county by the passing of a presentment. In my opinion the county never meant to take over this road as a permanent burden, and have not done so.

(1) 5 New Ir. Jur. 301. (2) Unreported.

There is another question that deserves notice. The granting or refusing of the prerogative writ of mandamus is within the judicial discretion of the Court, and it should not be granted unless a demand and refusal to comply with the prosecutor's requirements is established. The original application to the Rural District Council was to repair and to build a retaining wall. There is evidence that the cost of the latter would be about £2,000—besides the necessary expenses that would be entailed in its constant repair. In his affidavit Mr. Hewson still insists on the necessity for a retaining wall, although his formal demand and his conditional order only deal with repair of the road. But if once the road was taken over for repair, it might be difficult, if not impossible, for the county to escape from liability to carry out whatever works would be regarded as essential for proper repair—involving if necessary the erection and maintenance of a retaining wall. Can it be said that a proposal for repair alone, as distinct from repair and erection of a wall, was ever before the Council? It seems to me it never was, and that we would scarcely be justified in anticipating their determination by granting this writ.

Furthermore, the Rural District Council say that they have exhausted the funds legitimately at their disposal in respect of public works for the year 1907, and have had to negative two other applications for works, because of the absence of funds. In that view of the case it would be quite illusory to make an order for works when there was no money available for their completion. This is an additional circumstance, which, in my judgment, is a most important one, when we are asked to exercise our judicial discretion in favour of making absolute the conditional order.

Solicitor for the prosecutor: *M. C. Jameson.*

Solicitor for the County Council of County Wicklow: *J. H. M'Carroll.*

Solicitor for Rathdown No. 2 Rural District Council: *C. P. O'Neill.*

J. G. T.

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THE KING (at the Prosecution of MARY QUINN) *v.* THE CHAIRMAN AND JUSTICES OF TYRONE (1).

Licensing Acts — Spirit grocer and beer retailer — Peaceable and orderly manner — Renewal of license — Refusal — Objection — Appeal — Entering upon other grounds — Illegal evidence — Jurisdiction — Licensing Act, 1855 (18 & 19 *Vict. c.* 62), *s.* 2 — *Justices — Majority — Poll.*

A spirit grocer and beer retailer, who had been once convicted during the previous twelve months, being refused a renewal certificate by the Justices at the Annual Licensing Sessions, upon the ground that her house "had not been conducted in a peaceable and orderly manner during the past year," appealed to the Quarter Sessions. Section 2 of the Licensing Act of 1855, which gives the right of appeal, provides that, upon the hearing of the appeal, "no other grounds shall be entered upon except such as shall be stated in the order of refusal." Her solicitor urged upon the Chairman and Justices the hardship of depriving her of her license for one conviction, whereupon the Chairman elicited from the police witness that, besides the one conviction within the twelve months, she had been five times previously convicted. At the close of the case the Chairman refused to take a poll of the Justices (of whom there were twenty-five present), stating that they were unanimous; but, upon two Justices stating that they were for reversing the order of the Petty Sessions, the Chairman called upon those who were for reversing to stand up. Nine Justices, by standing up, signified their opinion in favour of reversing, whereupon the Chairman, without calling upon those who were for affirming to formally signify their opinions, declared that a large majority of the Justices were for affirming the order of the Petty Sessions:—

Held, by the King's Bench Division and the Court of Appeal, that the evidence as to the five convictions having been elicited by the Chairman for the purpose of removing the false impression created by the statement that there was only one conviction against the applicant, did not violate the provision that no other grounds should be entered upon except such as should be stated in the order of refusal.

Quære: Whether, in a case where there was legal evidence to support the order of the Quarter Sessions—viz. the one conviction within the year—the admission of illegal evidence in addition would oust jurisdiction?

Held, also, that the method adopted by the Chairman of taking the opinion of the Justices was both legal and adequate.

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Johnson and Wright, JJ.

CERTIORARI AND MANDAMUS.

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Mary Quinn, a spirit grocer and beer retailer, carrying on business at Ballymurphy, in the county Tyrone, applied at the Annual Licensing Petty Sessions, held at Coagh, on the 10th September, 1907, for a certificate of renewal of her spirit grocer's and beer retailer's licenses for the year ending October, 1908, pursuant to the Beer Houses (Ireland) Act, 1864, and the Licensing Acts, 1872 and 1874. The District Inspector of Constabulary objected to the granting of her certificate on the ground of the manner in which her house had been conducted during the previous twelve months, and gave in evidence against her convictions dating back to the year 1899; and thereupon the Justices refused to renew either her spirit grocer's or beer retailer's license, upon the grounds, as set out in the order "that the said house has not been conducted in a peaceable and orderly manner during the past year." From this order Mary Quinn appealed, and her appeal came before Sir Francis Brady, Bart., County Court Judge, and the Justices assembled at the Annual Licensing Quarter Sessions at Dungannon, on the 7th October, 1907, when Constable Cooke appeared, and opposed the granting of her application. The constable stated to the Chairman and Justices that besides one conviction within twelve months, there had been five previous convictions against her. The circumstances under which this statement came to be made were set out by Mr. R. H. Carson, the Sessional Crown Solicitor thus—"I tendered evidence of only one conviction which took place within the preceding twelve months; but the solicitor for the appellant kept laying so much stress on the fact of the magistrates refusing a certificate for only one conviction (suggesting thereby that there had never been anything but one conviction), that the County Court Judge himself asked the sergeant in charge of the case were there any previous convictions, and so brought out the fact that the appellant had been trading about eight years, and during that time there had been five convictions against her." Mr. John Malone, solicitor for the applicant, made an affidavit referring to a newspaper report of the proceedings, which he declared to be accurate, and which was also verified by the reporter, Mr. Edward Hurson. After

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giving the evidence of the constable as to the one conviction within the previous twelve months, the report proceeded :—

"To his Honour—Since the appellant got the license, there had been five convictions against her.

"Mr. Malone said his Honour could not take cognizance of anything that occurred before the present year.

"His Honour said they could.

"Mr. Malone said of course his Honour could do what he liked, but he believed he would not do that."

Evidence was then gone into by the Chairman and Justices as to the circumstance of the one offence within the twelve months, which were as follows:—On Sunday, the 11th November, 1906, her child was ill and in danger of death, and she sent for her servant-man, in order that he might go for a clergyman for her. Her servant-man being absent, she was obliged to send her son, a little boy, for the clergyman, who came and attended to her daughter. Later in the evening her servant-man and his sister came to the house, to ascertain what was wanted of him; one of her daughters supplied him with some drink, and for this offence a policeman who found him there prosecuted her, and procured a conviction.

At the conclusion of the evidence Mr. Malone asked the Chairman to take a poll of the Justices, of whom there were twenty-five present. The Chairman at first refused a poll, stating that they were unanimous. Two of the Justices indicated that they were for reversing the order of the Petty Sessions; and thereupon the Chairman asked any Justices in favour of the appeal to stand up. The newspaper report represented the Chairman as saying at this point, "They were asked to reverse the decision of their brother magistrates after five convictions against the applicant." Ten Justices stood up (one of them explaining that he stood up because he had not a chair), and thereupon the Chairman announced that there was a large majority against the appeal.

The Court granted a conditional order for writs of *certiorari* and mandamus on the following grounds—(1) That the orders of refusal to grant the certificate were without, and in excess of, jurisdiction, inasmuch as illegal evidence was received at the

hearing of the prosecutrix's appeal; (2) That no poll was taken of the Justices; and (3) That the order was not the order of the Quarter Sessions. Cause was shown by the objector.

James O'Connor, for the prosecutrix, in support of the conditional order:—

It was not ascertained effectively that the majority of the Justices were in favour of affirming the Petty Sessions order. It is quite a common thing for Justices to decline to vote upon a question; and it is impossible to say how many of the Justices present would have declined to vote. All the Justices must be counted: *Ernest* v. *Loma Gold Mines, Limited* (1); *Garton* v. *Southampton Justices* (2).

Section 2 of the Licensing Act, 1855 (18 & 19 Vict. c. 62), which gives the right of appeal from Petty Sessions to Quarter Sessions, provides that "no other ground for refusing such certificate shall be entered upon, except such as shall be stated in such order of refusal." The Justices did enter upon other grounds; not only did the Chairman allow the Justices to go into other grounds, but he actually directed that they should take those other grounds into consideration. This Court must be satisfied that the Justices acted on the grounds stated in the order of refusal: See observation of Lord Esher in *Reg.* v. *Lancaster Justices* (3), at p. 581. In *Lattimer* v. *Birmingham Justices* (4) it was taken for granted that if evidence was improperly admitted the order should be quashed. In *R.* (*Malone*) v. *Chairman and Justices of Tyrone* (5), Palles, C.B., says that if there are reasonable grounds for suspecting the fairness of the tribunal the judgment ought not to be allowed to stand. [The following cases were referred to: *R.* v. *Justices of Antrim* (6); *Penny* v. *South-Eastern Railway Company* (7); *The Queen* v. *Cotham* (8).]

(1) [1896] 2 Ch. 572.
(2) 57 J. P. 328.
(3) 55 J. P. 580.
(4) 40 J. P. 132.
(5) 3 New Ir. Jur. R. 177.
(6) [1901] 2 I. R. 133.
(7) 7 E. & B. 660.
(8) [1898] 1 Q. B. 802.

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The Solicitor-General (*Redmond J. Barry, K.C.*) and *Dudley White*, in support of the cause shown :—

The Chairman of Quarter Sessions declared in open Court and in the presence of all the Justices that there was a majority against the application. This declaration was not contested by any of the Justices, and what was done was a sufficient and legal ascertainment of the views of the Justices.

The Queen v. *Coll* (1) decides that where, upon cross-examination, it was disclosed that a Crown witness had omitted a certain fact from one information, the Crown were entitled to give in evidence an earlier information in which the witness did state that fact. Here the quality of the conviction during the year was called in question, and the earlier convictions were quite rightly introduced to show that the one conviction was not the innocent matter that it seemed. The cases of *The Rev. Daniel Stephens* (2) and *The King* (*Roe*) v. *Chairman and Justices of Roscommon* (3) are authorities for the proposition that where there is some evidence upon which the Quarter Sessions could act the Court will not inquire into the sufficiency of the evidence. [See also *In re Michael Russell* (4), and *Crepps* v. *Durden et alios* (5).]

Where there is legal evidence in fact sufficient to support the adjudication of an inferior tribunal, the reception, in addition, of illegal evidence does not vitiate the adjudication, and does not afford ground for *certiorari*. Here the Court finds that the ground of refusal to renew the certificate is that the house was not properly conducted during the year. There is evidence to support this ground, and the Court will not inquire whether there was, in addition, illegal evidence received.

James O'Connor, in reply.

(1) 24 L. R. Ir. 522.
(2) Crimes Act Cases, 297.
(3) [1905] 2 I. R. 101.
(4) 22 L. R. Ir. 487.
(5) 1 Sm. L. C. (11th ed.), 651.

LORD O'BRIEN, L.C.J. :—

In this case the magistrates at Quarter Sessions refused to grant to the applicant a renewal of two certificates that her house was conducted in a peaceable manner during the previous year. This order is sought to be quashed on substantially two grounds. First, that the sense of the Bench—the opinion of the magistrates—was not adequately ascertained. Second, that illegal evidence was admitted. As to the first ground, it has, in my opinion, no foundation; and indeed I did not understand Mr. O'Connor to press it at the close of his argument. Twenty-five magistrates were present. The Chairman of Quarter Sessions, Sir Francis Brady, asked all who were in favour of granting the license to stand up. Nine stood up, and the others remained sitting. This was plainly a declaration that the majority of the Court was against the license. It was a clear ascertainment of the opinion of the majority; and the opinion of the majority constitutes the judgment of the Court. There is no special mode prescribed by statute, or in any way indicated, for taking the opinion of the Court; and the manner pursued was, in our opinion, both legal and adequate.

As to the second point, I will assume for the moment that the quality of the evidence can be examined on an application for a writ of *certiorari*. It is said that previous convictions against the applicant for breaches of the Licensing Law were given in evidence; that the Chairman directed that, in adjudicating upon the question—the precise issue before the Bench—viz., whether the house had been conducted in an orderly manner within the last twelve months preceding the application, the Court might regard convictions beyond the limit of that year. Assuming this direction to be wrong, was it given? In my opinion it is not proved that it was given. On the contrary, Mr. Carson, the Sessional Crown Solicitor, who appeared for the prosecution, distinctly states in his affidavit that he did not contend for any such proposition, and that he asked his ground of opposition to be confined to the conviction which had been obtained within the twelve months; and he distinctly states in his affidavit that no such direction as was alleged to have been given by Sir Francis Brady was in fact given. Now, if there was any difference

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between the newspaper report and the evidence of Mr. Carson, I should adopt what Mr. Carson states. The newspaper report, the Solicitor-General not objecting, was admitted *quantum valeat*. It must not be taken that there was any formal ruling that newspaper reports could be given in evidence. But taking the newspaper report as we find it, and looking at the whole case, including Mr. Carson's graphic account of what took place, what is the true conclusion? It seems to me to be this, that the solicitor for the applicant—a most respectable gentleman I believe—pressed, if not in direct terms, at least impliedly—conveyed, if he did not expressly state in so many words—that there had been but one conviction obtained against the applicant during the entire of her trading, that her conduct—her career—had been blameless, with the exception of one very slight lapse, and that it would be in fact Draconic—a cruel administration of the law—to refuse a license to one who had been a practically blameless trader. He appealed with much dexterity to an entire career. The Chairman asked was she not convicted before. The question, which was provoked by the allegations deftly made by the solicitor, was put to keep the Court right, to prevent—to remove—any false impression, to let the investigation start and be kept on a fair basis. The Chairman's object was not to prejudice the applicant, but to protect—to safeguard—the investigation from false impressions created by misleading statements. Certainly every Court of justice should do this. Is it to be said that a judge is not justified in guarding against and dispelling misleading impressions? Sir Francis Brady is accused of doing what he merely wished to prevent. He may not have expressed himself with absolute precision. No Court is expected to express itself with Addisonian simplicity and precision. Whilst we are bound to keep inferior courts within the limits of their jurisdiction, I for one disclaim any obligation to give effect to captious criticism, however ingeniously made.

Now, the point hardest pressed against the learned Judge is alleged to be contained in one passage of the evidence as appearing in the newspaper. It is this: "His Honour said they were asked to reverse the decision of their brother magistrates after five convictions against the applicant." It is alleged that this meant

that they should regard as evidence on the particular application before them—on the precise issue before them—the previous convictions. I do not think it bears any such meaning when it comes to be fairly considered. He did not allege that the five previous convictions gave, or could legitimately give, tone or added significance to the evidence on the precise actual issue in the present case, although perhaps it might be argued that these convictions could legitimately have that effect. However, I am careful not to rest my decision in the present case on the alleged application of such cases as *Makin* v. *The Attorney-General for New South Wales* (1) and *The King* v. *Wyatt* (2). What Sir Francis Brady meant was, that the magistrates should not allow themselves to be carried away by the erroneous assertion that this lady had a stainless record. The fact was that she had not a clear record, and he wanted to keep the atmosphere free from any wrong impression. The Chairman did not state that the adjudicating magistrates could look for *evidence* in the previous convictions, but that they might regard them to dispel erroneous impressions conveyed by the applicant's solicitor. This is what he meant, if he said they might regard previous convictions; but the allegation that he said anything of the nature imputed is disposed of by Mr. Carson's affidavit. I repeat, if there is any apparent conflict between the newspaper report and Mr. Carson's affidavit, I adopt the latter. In my opinion there was no evidence of an illegal character admitted. What was done was merely an attempt by the learned Judge to remove a false impression; and is a court of justice not to safeguard the administration of justice—not to wipe out a false impression deftly, but unjustifiably, created which may prejudice its judgment? If this cannot be done, the administration of our law is hide-bound by a fatal—a disastrous—artificiality. But I am clearly of opinion that it can be done.

Now, that being so, no other question remains, because the sense of the Court was properly ascertained, a formal order made, and no illegal evidence admitted. But the Solicitor-General, who always gives us much assistance, says: "Assuming for the moment that there was illegal evidence admitted, there was, in addition to the illegal evidence, plainly legal evidence—there

(1) [1894] A. C. 57. (2) [1904] 1 K. B. 188.

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was a conviction within the year; that once there was legal evidence, there was jurisdiction to determine the question; and that you cannot take that jurisdiction away by showing there was illegal evidence as well as legal evidence; that even if you could segregate the evidence, which is not permissible to do, you could not thereby oust jurisdiction." It is not necessary to decide this point. My present impression is with the Solicitor-General, and I think that what he cited from *Stephens' Case* (1) goes to bear out his contention. Under the circumstances, it is not requisite to discuss the Lord Chief Baron's view in *The Queen* v. *Russell* (2), or to ascertain how far that case was overruled by *Prenty's Case* (3).

But I would like to say just one word upon the Act of Parliament. The passage in the section of the Act of Parliament upon which the case turns is: "And in such appeal the party opposing such application shall be respondent, and no other ground for refusing such certificate shall be entered upon except such as shall be stated in such order of refusal." What is the meaning of that? It is not requisite for me to give any opinion in this case, because I do not think any illegal evidence was admitted; but it would appear to me that it might be argued—I say no more—that the meaning of the section is this, that the prosecuting authority—the police—shall not enter upon any other matter for the purpose of making it a substantive and independent ground "for refusing such certificate." That was not done here at all. The substantive ground of decision was, that the applicant traded improperly within the preceding twelve months. However that may be, I offer no opinion upon it: there was in my opinion no illegal evidence admitted; and the application for a *certiorari* must be refused.

JOHNSON, J.:—

The grounds in the conditional order are—1, want of jurisdiction, as illegal evidence was received on the hearing of the appeal; 2, no poll taken of the Justices; and 3, the order was not the order of the Quarter Sessions. As to the second and

(1) Crimes Act Cases, 297. (2) 22 L. R. Ir. 487.
(3) [1905] 2 I. R. 101—*The King* (*Roe*) v. *Justices of Roscommon.*

third grounds—the Chairman of the county is by statute Chairman of Quarter Sessions; his function is to ascertain and announce the decision of the Court. Twenty-five magistrates were present, and not unanimous. The Chairman in open Court asked those in favour of the appellant to stand up. Ten stood up, but one of the magistrates explained that he stood up because he had no chair to sit down. Therefore, nine of the magistrates who stood up, by doing so, signified their opinion in favour of the appellant. The remaining fifteen kept their seats, and, by doing so, signified their opinion against the appellant, and the Chairman announced the decision of the Court (the majority of the magistrates present), affirming the order of the magistrates at Petty Sessions, refusing the certificate, on the ground that the house had not been conducted in a peaceable and orderly manner during the past year. The second and third grounds, therefore, of the conditional order failed. The first ground, that illegal evidence was received, is a more serious point. I prefer the affidavits to the newspaper report, of which Mr. Malone says the account of the proceedings is *substantially* true. Mr. Hurson, the reporter, says he took an accurate note, and the report in the newspaper is a true and accurate account of the proceedings; but neither this note nor a transcript of it is referred to. The statute which gives the right of appeal provides that "no other grounds shall be entered upon except such as shall be stated in the order of refusal," viz. in the present case, that the house was not conducted in a peaceable and orderly manner during the past year. Mr. Carson states that he tendered the evidence of only one conviction within the past year. His affidavit then proceeds: "But the solicitor for the appellant kept laying so much stress on the fact of the magistrates refusing a certificate for only one conviction (suggesting thereby that there had never been anything but one conviction), that the County Court Judge himself asked the sergeant of police in charge of the case were there any previous convictions, and so brought out the fact that the appellant had been trading about eight years, and during that time there had been five convictions against her." This is not controverted by Mr. Malone, and is the *illegal evidence* relied on. But these previous convictions were not put in evidence.

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Johnson, J.

Mr. Carson's statement that Mr. Malone *kept laying so much stress* on the fact of the magistrates refusing the certificates for only one conviction, might naturally have led to the suggestion that the appellant had not before transgressed the law, and was therefore entitled to their favourable consideration, and led to the Chairman's question whether there was anything against her previously. But Mr. Carson distinctly denies (paragraph 3 of his affidavit) "that the County Court Judge (the Chairman) directed the Justices present that they were bound to take into their consideration any previons conviction against the house and premises." Of course, such direction or advice would have been contrary to the statute. If the answer to the Chairman's question had been in the negative, Mr. Malone's persistent appeal to the sympathies of the magistrates would have been reasonable; but, as the answer was in the affirmative, Mr. Malone's appeal to sympathy was unreasonable.

This question of the admissibility in evidence of previous convictions has been frequently before the Court. In the present case they were not in evidence, nor tendered in evidence. In the case of *Makin* v. *The Attorney-General for New South Wales* (1) the Lord Chancellor (at page 65) says:—"In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is, undoubtedly, not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy; but it is obvious

(1) [1894] A. C. 57.

that it may be often very difficult to draw the line and decide whether a particular piece of evidence is on the one side or on the other." In the present case these previous convictions were not given in evidence. They were referred to only to remove or prevent erroneous sympathy. The prosecution gave in evidence only the one conviction in the past year. Mr. Malone contended, and rightly, that the magistrates had no jurisdiction in arriving at their decision to consider the previous convictions. The solicitor for the prosecution, Mr. Carson, admitted this and argued that the one conviction in the past year was sufficient, and that the magistrates with that conviction before them in evidence could not conscientiously decide that the house had been conducted properly. I therefore think that the first ground also fails, and that illegal evidence was not admitted. See also case of *R.* v. *Wyatt* (1), Crown Cases Reserved.

Wright, J.:—

I concur. The grounds set forth in the conditional order are really two. As to the second ground, viz., that no poll was taken by the Justices, and that the order is not the order of the Quarter Sessions, I have had no doubt at any period of the argument. The course of the hearing before the Chairman and Justices was that the Chairman asked all who were for reversing the order of Petty Sessions to stand up; nine stood up, and it was taken as conceded by everyone present that the remaining sixteen were for affirming the Petty Sessions order. The Chairman announced that as the result of the deliberations of the Court, and the announcement that the application was refused was not challenged by anyone. The first ground was "that the orders of refusal were without jurisdiction and in excess of jurisdiction, inasmuch as illegal evidence was received at the hearing of the prosecutrix's appeal." The prosecutrix applied to the Justices at Petty Sessions for a certificate of renewal of her license, and she was successfully opposed on the ground that her house had not been conducted in a proper and orderly and peaceable manner during the preceding twelve months. She appealed from that order to the Quarter

(1) 1 Q. B. 188.

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Sessions, and, as has been already stated by the other members of the Court, the opposition before the Quarter Sessions was confined to that one ground, viz., the manner in which the house had been conducted during the preceding twelve months. Mr. Carson, the Crown Solicitor, says:—"I tendered evidence of only one conviction, which took place within the preceding twelve months; but the solicitor for the appellant kept laying so much stress on the fact of the magistrates refusing a certificate for only one conviction (suggesting thereby that there had never been anything but one conviction), that the County Court Judge himself asked the sergeant in charge of the case were there any previous convictions, and so brought out the fact that the appellant had been trading about eight years, and during that time there had been five convictions against her." In other words, the suggestion was that the applicant was a woman of blameless character, who had lapsed into error on one occasion; that her offence on that occasion was a very venial one, viz., supplying drink one Sunday evening to her own servant-man, who had come to her house in response to a message that he was required to go for a clergyman to attend a sick child; and that it would be an injustice to confiscate her property on account of that one transaction.

In Criminal Courts it is a settled rule that if the prisoner's advocate makes any attempt to show that the prisoner is a man of blameless character, it is at once open to the prosecution to show what the prisoner's record has been. Mr. Carson says that he conceded Mr. Malone's contention that the Justices in arriving at their decision had no jurisdiction to consider the previous convictions at all, but argued that "one conviction within twelve months was as bad as twenty; as what the Justices were asked to do was to sign a certificate that the house had been properly conducted during the preceding twelve months; and that I did not see how any Justice could conscientiously do this in face of the one conviction." I therefore do not think that any illegal evidence was admitted. I think that what came out was due entirely to Mr. Malone's insistence that there had been only one trivial conviction against the applicant. I agree entirely with my brother Johnson, in saying that the introduction of the previous convictions can be sup-

ported also upon the ground that evidence of acts committed at a prior period can be given in order to show the character and quality of the acts during the period in question. Such evidence was given in *Blake* v. *Albion Life Assurance Society* (1), and in *Makin* v. *Attorney-General for New South Wales* (2), and in the latter case was supported by Sir Edward Clarke in his argument as showing the existence of motive and a systematic course of conduct. But I prefer to rest my judgment on the other ground.

For these reasons I concur in holding that the conditional order should be discharged.

J. L.

Appeal. 1908.
Jan. 17, 18, 20.

The prosecutor appealed (3).

James O'Connor, for the appellant.

The Solicitor-General and *Dudley White*, for the respondent.

Jan. 20.

THE COURT OF APPEAL affirmed the judgment of the King's Bench Division, and dismissed the appeal.

Solicitor for the prosecutor: *John Malone.*
Solicitor for the objector: *R. H. Carson.*

R. ST. J. C.

(1) 4 C. P. D. 94. (2) [1894] A. C. 57.
(3) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

K. B. Div. 1906.

Nov. 21.

1907.

Feb. 20.

RIORDAN AND OTHERS *v.* IRVINE (1).

County Court—Execution of decrees—Misconduct of sheriff's bailiff—Liability of sub-sheriff—Re-appointment—Time—27 & 28 Vict. c. 99 (Civil Bill Courts Procedure), s. 5.

A civil-bill decree was lodged with a sub-sheriff for execution. The amount was paid by the debtor to the sheriff's bailiff, who appropriated it to his own use, and paid no part of it to the sheriff. More than six months after the succeeding high sheriff had been sworn into office, and the sub-sheriff was re-appointed by him, the execution creditor sued the sub-sheriff for the amount paid to the bailiff, and for a false return of *nulla bona* in respect thereof:—

Held, that the sub-sheriff was protected by sect. 5 of 27 & 28 Vict. c. 99, and was not liable to be sued for the amount of the decree.

SPECIAL CASE stated by the Right Hon. The Lord Chief Baron, Judge of Assize, upon the hearing of a civil-bill appeal at the Tyrone Summer Assizes, 1906, of which the following are the paragraphs material to this report:—

1. A civil bill at the suit of James Riordan, Francis Shields, and Michael Shields against Henry Irvine, sub-sheriff of the county of Tyrone, was brought to recover £50 for money alleged to be due, for money had and received, money had to the use of the plaintiffs, and for false return at the Omagh April Sessions, and was dismissed by the County Court Judge. The plaintiffs appealed, and the appeal was heard by me at the Summer Assizes, 1906, for the county of Tyrone.

3. The defendant is, and has been for many years, sub-sheriff of the county of Tyrone being re-appointed each year by the successive high sheriffs for a period of more than six years.

6. In the claim arising upon the decree of *Riordan and Others* v. *Daniel M'Donald* (part of the sum sued for) it was proved that a decree was obtained at Cookstown Sessions of June, 1903, at the suit of *James Riordan and Others* v. *Daniel M'Donald* for debt

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

£11 19*s.* 6*d.*, and costs £1 5*s.*, making £13 4*s.* 6*d.*; allowing £5 paid on account, and 1*s.* 6*d.* for sheriff's warrants, £8 6*s.* remained due on foot of this decree. On the 17th July, 1903, the decree was lodged with the sub-sheriff for execution. It was proved, and I found as a fact, that the full amount, £8 6*s.*, was paid to George Smith, the sheriff's bailiff, on foot of said decree, on the 24th August, 1903, and that a receipt in full was given by said George Smith therefor. It was admitted that the sub-sheriff did not in fact receive from the bailiff any part of said sum.

7. It was contended on the part of the plaintiffs that the sub-sheriff is liable to the plaintiffs for the amount so received by the bailiff on foot of said decree, notwithstanding the proviso in sect. 5 of the 27 & 28 Vict. c. 99. It was contended on the part of the defendant that the sub-sheriff was protected by said proviso and was not liable, the action having been brought more than six months after the departure from office of the high sheriff for the year 1903.

8. I was of opinion that, as "sheriff" is by sect. 3 of the Act defined so as to include "under-sheriff," the defendant was within the proviso, and that upon his taking the declaration (which has been by statute substituted for the former oath of office) upon his re-appointment as sub-sheriff by each new high sheriff he, although successor only to himself as sub-sheriff, became a "succeeding sheriff" within the meaning of that expression in the proviso, and consequently was entitled to the protection afforded by it. I accordingly expressed my intention to disallow the plaintiff's claim in respect of this item; but

9. At the request of Mr. Wylie, K.C., on behalf of the plaintiffs, who stated that the question was one of general importance, I agreed to state this case. The question for the opinion of the King's Bench Division is whether, on the facts above stated and found by me, the defendant is liable, as sub-sheriff, to be sued by the plaintiffs for the amount of said decree received by his bailiff on the 24th August, 1903.

C. PALLES.

2nd August, 1906.

K. B. Div. 1906.

RIORDAN v. IRVINE.

Serjeant Dodd and *Murnaghan*, for the plaintiffs:—

The neglect or omission by the sheriff to pay the money received by the bailiff on his behalf for the plaintiff, was not neglect or omission to which the protections given by sect. 5 of the 27 & 28 Vict. c. 99, exclusively apply. Once the money passed into the hands of the bailiff for the sheriff, the functions of the sheriff were at an end, and there was a common law liability to pay over the amount received to the plaintiff, which liability is not within the contemplation of the proviso. [They referred to the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), sect. 1; *Campbell* v. *Carville* (1); *Dalton* v. *Mayor and Corporation of Clonmel* (2); *Sharpington* v. *Fulham Guardians* (3); *Morland* v. *Pellatt* (4); *M'Morrin* v. *Dixon* (5).]

Henry, K.C., and *Gaussen*, for the defendant:—

Section 5 of the 27 & 28 Vict. c. 99 provides that the sheriff shall appoint bailiffs to assist him in the execution of the duties imposed on him by the Act. This is a duty imposed upon the sheriff by the Act, and the plaintiffs, even if in time, could not maintain the action at all without the aid of sect. 4 of the Act, which makes the sheriff responsible for his own acts and defaults, and for the acts and defaults of his bailiff.

[They referred to *Malcomson* v. *Verner* (6), and *O'Dea* v. *Hickman* (7).]

1907. Feb. 20.

The judgment of the Court was delivered by—

WRIGHT, J., who, after referring to the facts set out in the case stated, proceeded:—

Prior to the year 1864, the law as to the execution of civil-bill decrees in Ireland was regulated by the Civil Bill Courts Act of 1851, 14 & 15 Vict. c. 57, s. 145 of which provided that all civil-bill decrees should be executed either by the sheriffs of

(1) 13 I. L. T. R. 159.
(2) 14 I. L. T. R. 118.
(3) [1904] 2 Ch. 449.
(4) 8 B. & C. 722.
(5) 31 I. L. T. R. 1.
(6) 17 I. L. T. R. 63.
(7) 20 L. R. Ir. 431.

the several counties, or, at the request of the plaintiff, by any person authorized by the said sheriffs, by special warrant, to act as bailiff at the peril of the party making such request. This was changed by the 27 & 28 Vict. c. 99, s. 4 of which enacted that all decrees of the Civil Bill Court should be executed by the sheriffs, or by their bailiffs appointed under that Act, and *by no other persons.* The sheriff is required under section 5 of the same Act (27 & 28 Vict. c. 99) to appoint a sufficient number of bailiffs to assist him in the execution of the duties imposed on him by the Act, and by section 4 he is made responsible for his own acts and defaults, and for the acts and defaults of his bailiffs, in the execution of those duties. This was a change in the law, and by it a new duty and new liability were cast upon the sheriff. He is given protection by section 5 of the Act, which enacts that no action or other proceeding shall be taken against any sheriff "for any act, neglect, or omission in respect of the provisions of this Act after the expiration of six calendar months from the day on which the succeeding sheriff shall be sworn into office." He is further protected by section 64 of the same Act.

To quote from the judgment of Barry, L.J., in *O'Dea* v. *Hickman* (1): "The sheriff is liable, unlike any of these cases I have put, even for the unauthorized tortious acts of his bailiffs. That being so, this Act of Parliament was passed, which cast on the sheriff, for the first time, the onerous, the seriously onerous, duty of executing the multitude of civil-bill decrees throughout the country; and therefore justice required that protection should be given him as far as possible."

It has been admitted by counsel for the plaintiff—and as to this no admission is required, for the words of the statute so expressly declare—that under the Act of 1864 the sub-sheriff is as liable and entitled to the same protection as the sheriff: vide section 3, "the word 'sheriff,' shall include 'under-sheriff.'"

The default here complained of was the act of the bailiff, who executed the decree, realized the amount, but did not pay it over to the sub-sheriff or sheriff. Section 16 of the Act (27

(1) 20 L. R. Ir. 431, at pp. 435, 436.

K. B. Div. 1907.

RIORDAN v. IRVINE.

Wright, J.

& 28 Vict. c. 99) declares very clearly the duties of the sheriff as to executing decrees and payment over of the money realized to the party entitled, or returning decrees if unexecuted. In the present case the decree was lodged with the sub-sheriff for execution on the 17th of July, 1903, and the amount was realized by the bailiff, whereby the debtor was discharged; but the bailiff kept the money, and it was admitted, as is stated by the learned Chief Baron, in the special case, that none of it reached the hands of the sub-sheriff. On the 19th of July, 1904, a return of *nulla bona* was made; and it was therefore the case of the bailiff having got the amount, and having wrongfully and in breach of his duty failed to pay it over to the sheriff or sub-sheriff—the bailiff closed on the money, and obviously told the sub-sheriff that he was unable to realize anything. As already pointed out, the sheriff (and sub-sheriff) is by section 5 of the Act made responsible—(1) for his own acts and defaults; (2) for the acts and defaults of his bailiffs. He gets under the same Act the protection of the six months' time limit, if the breach of duty for which it is sought to hold him liable is breach of a duty for the first time cast upon him by the Act. If he were already liable by previous statute or by common law, *e.g.*, if he had got the money realized by the execution, the protection of the Act would not apply: *Malcomson* v. *Verner* (1). I am of opinion that the act or default of the bailiff relied on here as rendering the sub-sheriff liable was an act or default under the provisions of the 27 & 28 Vict. c. 99, for which, but for that Act, the sub-sheriff would not have been liable, and that he is protected as to time by section 5; and, accordingly, that as this action, so far as regards the particular sum dealt with in the case stated, was commenced more than six months after the day on which a new sheriff was sworn into office, it cannot be maintained.

Solicitors for the plaintiff: *Shields & Murnaghan.*
Solicitors for the defendant: *Dickie & Carson.*

J. L.

(1) 17 Ir. L. T. R. 63.

IN THE MATTER OF AN ARBITRATION BETWEEN JAMES DONOVAN AND REV. JOSEPH BURKE (1).

K. B. Div. 1908. Jan. 31. Feb. 3.

Arbitration—Term of contract—Work done—Ascertainment of price—Submission to arbitration—Condition precedent—Death of party before award—Right to continue proceedings—Personal representative—Surviving partner—R. S. C., I. (1905, 22*nd February*), *Order XVII., R.* 4.

A clause in a building contract, made between parties designated therein as "the employer" and "the contractor," provided that, in the event of a dispute in reference to the quantities or prices of additions, variations, or omissions, the items should be referred to the arbitration of two architects, one to be named by each of the parties, with power to them to appoint an umpire; and that the decision of the arbitrators and umpire as to such items should be conclusive and binding on the parties. The clause also provided that the employer's architect should give a certificate for the amount so found by arbitration, and that the employer should be bound to pay the contractor "the sum specified in the architect's certificate, and no more."

A submission to arbitration under the clause was made a rule of Court, and the umpire made an award, which was, by order of the Court, sent back to him in consequence of his having included in it matters not submitted to him. Before any further award was made the contractor died. On a motion for leave to continue the proceedings in the joint names of the personal representative of the contractor and of his surviving partner:—

Held, by Palles, C.B., and Boyd, J. (Johnson, J., dissenting), (1) that ascertainment of the price of extras by arbitration was a condition precedent to the right to recover any sum in respect thereof; (2) that the proceedings should be continued in the name of the personal representative of the contractor, but not in the name of his surviving partner.

Blundell v. *Brettargh* (17 Ves. 232) distinguished.

MOTION for leave to carry on certain arbitration proceedings in the joint names of the administratrix and of the surviving partner of a deceased party to the deed of submission to arbitration.

By contract, dated June 30, 1902, James Donovan, therein called the contractor, agreed with the Rev. Joseph Burke, P.P., therein called the employer, to perform certain work in connexion

(1) Before PALLES, C.B., and JOHNSON and BOYD, JJ.

K. B. Div. 1908.

In re ARBITRATION BETWEEN DONOVAN AND BURKE.

with the renovation and enlargement of a church in Dublin, in accordance with the plans and specifications annexed to the contract, for £4950; and the Rev. Joseph Burke agreed to pay that sum "at such time and in such manner as were in the general conditions of contract set forth." This agreement was expressed to be "in conformity with the conditions of contract annexed thereto," of which the following clauses are material for the purposes of this report. The person referred to as "the architect" in these clauses was appointed by the employer to act as architect in and about the carrying out of the work, and to see that the conditions of the contract were duly performed.

"8. The certificate of the architect, showing the final balance due or payable to the contractor, shall be final and conclusive evidence of the works having been duly completed, but without prejudice to the liberty of the contractor under the provisions of clause 11.

"9. Deviations by omission, addition, or variation from the work, as set forth in the contract, plans, and specifications, duly sanctioned by the architect, shall not vitiate or annul the contract. . . . No allowance shall be made for extras unless certified as such by the architect by an order in writing as an extra, or by subsequent written approval.

"10. The prices in the detailed estimate furnished by the contractor to the architect, marked in the schedule of prices, shall be the values of all additions, omissions, or variations, unless at any time it shall appear that such prices have not been fairly made up, and, as a schedule of prices, shall stand as a part of the contract; but the employer shall not be responsible for omission of items, or accuracy of the quantities. The architect shall have power at any time to appoint a building surveyor to check or measure up works, a statement of which may have been returned from time to time, and which shall be admitted to be works extra to the contract, or to measure up works which may be omitted or altered from time to time; and at completion the architect shall have power to appoint the same or another surveyor to prepare a bill of omissions, additions, or variations, and price the same, as hereinbefore provided.

"11. Should any misunderstanding arise between the architect and the contractor in reference to the quantities or prices of additions, variations, or omissions duly ordered, as hereinbefore set forth, the architect shall have power to name a building surveyor to take out or measure quantities and price, save as hereinafter provided; and when the surveyor shall have made up his said account he shall furnish a copy thereof to the architect and to the contractor, and if either party

shall object thereto he shall be at liberty to do so within days [*sic*, in original] after the same shall have been furnished, specifying such objections in writing, detailing the items; in which case, unless the architect and the contractor agree thereto, the said items shall be referred to the arbitration of two architects, one to be named by the architect and one by the contractor, with power to them to appoint another architect as umpire, and the decision of the said arbitrators and umpire as to the said items is to be binding and conclusive on the contractor, the employer, and the architect; and the account is, in like manner, to be binding and conclusive on the same parties as to all items not the subject of objection, as aforesaid; and the architect shall give the contractor a certificate therefor, or, in case of objection, for the amount to be ascertained as aforesaid; and the employer shall be bound to pay the contractor for such extras the sum specified in such certificate, and no more, within one week after the production to him by the contractor of such certificate.

"13. The decision of the architect on all questions that may arise relating to the execution of the works, the meaning of the drawings and specifications, the manner of the execution of the works, or the quality of materials, the nature, quantity, and quality of the works executed, or to be executed, or what amount was included in the contract, is to be final, conclusive, and binding.

"14. Payments may be made from time to time on the certificate of the architect, but so that such payments shall never exceed the value of seven-eighths of the work done, and the balance, after possession shall have been given up, within four months of the architect's final certificate."

Disputes having arisen between the parties as to the amount due for extras, the question was, in accordance with the provisions of clause 11 of the contract, referred to the arbitration of two arbitrators and an umpire. The submission to arbitration was received and made a rule of Court on 7th March, 1906. The umpire made and published his award on 23rd March, 1907, but, instead of finding the amount due for extras only as directed by the submission to arbitration, he found and stated in one figure the amount of extras and the balance due on the contract. By order of 29th June, 1907, the award was sent back to the umpire, and he was thereby directed to award specifically the amount, if any, due for extras.

James Donovan, party to the contract and to the submission to arbitration, died on 30th June, 1907, and letters of administration

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to his estate were granted to Annie Wells Donovan on 14th September, 1907.

Edward James Donovan, a son of James Donovan, deposed on affidavit that he entered into partnership with his father by a verbal agreement on 1st January, 1902, but that the name of the firm was not changed till January, 1903. He also deposed that an account of the partnership was taken after his father's death, the balance found due being paid to him by the administratrix ; and that the amount at issue in the arbitration proceedings was divisible equally between him and the administratrix of his father. There was, however, no allegation that the Rev. Joseph Burke was aware of the existence of the alleged partnership, either when he entered into the contract with James Donovan, or at any subsequent date during the life of the latter.

Ignatius O'Brien, K.C. (*P. A. O'C. White* with him), for the administratrix and the surviving partner of James Donovan :—

This case comes within the operation of Order XVII., Rule 4 : see the definitions of "cause" and "matter" in the Judicature Act (Ireland), 1877, sect. 3. In this case the award of an arbitrator is a condition precedent to the right to sue on the contract for the value of extras; and where an arbitrator is in the position of a person appointed by vendor and purchaser to fix the price to be paid, his authority is not revoked by the death of a party to the submission : *Caledonian Railway Co.* v. *Lockhart* (1). Clause 11 of the contract is general in its terms, and though an agreement to refer to the arbitration of a particular person may be revoked, a general agreement to refer cannot : *Deutsche Springstoff Actien Gesellshaft* v. *Briscoe* (2).

H. Wilson, K.C., and *Bartley*, for the Rev. Joseph Burke :—

The award having been remitted to the umpire for reconsideration, is avoided altogether and is a nullity : *The Dare Valley Railway Co.* v. *Rhys* (3). The case therefore comes under the rule that, in the absence of a special provision to the contrary in the submission, the death of a party before the award revokes the

(1) 3 Macq. 808. (2) 20 Q. B. D. 177 : 57 L. J., Q. B. 4.
(3) L. R. 4 Ch. App. ; 38 L. J., Ch. 417.

submission: *Cooper* v. *Johnson* (1); *President and Members of the Orphan Board* v. *Van Reenen* (2); *Blundell* v. *Brettargh* (3); *Potts* v. *Ward* (4); *Tyler* v. *Jones* (5); *Edmunds* v. *Cox* (6); *Rhodes* v. *Haigh* (7). The reason for this rule is given in a note to *Vynior's Case* (8). To avoid the inconvenience arising from it, Abbott, C.J., suggested the propriety of inserting in submissions a clause to prevent the death of one of the parties operating as a revocation of the submission: *Cooper v. Johnson* (1); a similar suggestion was made by Lord Eldon in *Blundell* v. *Brettargh* (3). Even where there was a clause in an order of reference to arbitration directing the award to be delivered to the personal representative, in the event of death of one of the parties, and death occurred before an award was made, the Court refused to compel the arbitrator to proceed with the reference, or to compel the personal representative of the deceased party to appear before him: *Lewin* v. *Holbrook* (9). That case was decided before Order XVII., Rule 4, came into operation; but we submit that this rule only applies to cases in which matters in dispute in an action are referred to arbitration. In *Potts* v. *Ward* (4) an award was made only a few hours after the death of one party to the submission, yet it was held to be unenforceable; and in *Blundell* v. *Brettargh* (3), although the parties contracted for themselves, their heirs, and executors to abide the award, Lord Eldon held that the death of a party before award revoked the submission. The Lands Clauses Consolidation Act, 1845, contains express provisions that the death of a party shall not revoke the submission. As to Edward James Donovan, even admitting that a partnership existed between him and his father, he was not a party to the submission, and has no *locus standi*: *In re Hare, Milne and Hasswell* (10); *Stead and Others* v. *Salt* (11).

[They also cited Russell on Arbitration (3rd ed.), p. 152, and Redman on Arbitration and Award, p. 106.]

(1) 2 B. & A. 394.
(2) 1 Knapp's Privy Council Rep. [83.
(3) 17 Ves. 232.
(4) 1 Marsh. 366.
(5) 3 B. & C. 144.
(6) 2 Chitty Rep. 432.
(7) 2 B. & C. 345.
(8) 8 Rep. 81 *b*.
(9) 11 M. & W. 110.
(10) 6 Bing. (N. C.) 158.
(11) 3 Bing. 101.

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P. A. O'C. White, in reply :—

The agreement in clause 11 is part of the consideration for the contract, and therefore the submission cannot be revoked: *Forwood and Co.* v. *Watney* (1). A general agreement to refer to arbitration cannot be revoked: *Piercy* v. *Young* (2).

PALLES, C.B. :—

As the Court are not unanimous in this case, I proceed to state the reasons that have actuated me in coming to a conclusion, which (but for the difference of opinion between me and one of my brethren) would have been a very clear one, namely, that this application ought to be granted.

The application is made under Order XVII., Rule 4, on the part of Annie Wells Donovan, the administratrix of James Donovan, deceased, and Edward James Donovan for an order that the proceedings may be continued in the names of those two persons in the place of James Donovan, deceased.

The proceeding is the matter of a reference to arbitration, in which an order was made by this Court upon the 29th January, 1907, referring back a certain award to the arbitrators. The award has not yet been made; and James Donovan, one of the parties to the arbitration, having died, the matter, in my opinion, comes within the operation of Order XVII., Rule 4.

I do not think that Edward James Donovan, who alleges that he was a partner in Donovan's concern when the contract was made, has any right to come in here, and ask that he may be made a party to the proceeding; but if we are of opinion that the other applicant, Annie Wells Donovan, the administratrix, is entitled to the order, it would be the merest technicality to refuse her application because she asks that Edward James Donovan also may be brought in.

The arbitration was held under the provisions of a certain building contract, which was entered into on the 30th June, 1902, between James Donovan of the one part, and the Rev. Joseph Burke of the other part, for the building of a church; and it is sufficient to state, in reference to that contract, that the question

(1) 49 L. J., Q. B. 447. (2) 14 Ch. D. 200.

whether Donovan, the builder under it, is entitled to be paid for extra work, and, if so, the amount to which he is so entitled, depends upon the certificate of a certain architect, whom I will call the arbitrator here; and that the object of this arbitration is to procure that certificate. I do not think that it actually touches the legal question for our decision, but it is as well to state that the difference between the parties is whether Donovan or his representatives are entitled against Mr. Burke to £702 6*s.* 5*d.*, in addition to an admitted amount of £543 5*s.* 10*d.*

It is plain upon the construction of this contract that unless the certificate can be obtained in respect of that sum of £702 6*s.* 5*d.*, the representative of the builder here will not be entitled to recover it. The contract is to pay, not a *quantum valeat*, but a sum to be ascertained in a particular mode; and I know of no authority, either at law or in equity, that will enable this Court to substitute for that contract to pay a sum ascertained in a particular way, a contract to pay a sum ascertained in any other way. From the time of the decision in *Milnes* v. *Gery* (1) that has been treated as settled law; so that, if on account of the death of the contractor after the work had been finished, the certificate of the arbitrator cannot be obtained, the representatives of the builder are left without a remedy for a sum of money to which he may have been entitled.

Now I am of opinion that that was not the contract of the parties. I think the parties contemplated payment—irrespective of the accident of death—for any work that was done; but that the only payment they contemplated was payment of a sum of money to be ascertained in the mode pointed out by the contract.

In answer to the application, it is said that there is a strict rule of law, which, no doubt, if it ever existed, still exists in Ireland, though it has been abrogated in England by the Act of 1889, that the death of a party to such a contract as this revokes the authority of the arbitrator, and renders it impossible that the arbitration can be proceeded with; and, if there be such a rule of law, of course we must abide by it, even although we are of opinion that it works injustice. I am, however, of opinion that

(1) 14 Ves. 400.

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the rule of law has been much too widely stated; and that it has no application to a contract of this description. Of course I admit the statements that are to be found in all the text-books, in which it is said that, in the case of a contract to refer to arbitration, the death of a party, though it does not revoke the submission, does revoke the nomination of the arbitrator, and does prevent him proceeding with the arbitration. If we go back to the origin of that rule, which is to be found in the case referred to by Mr. Bartley, *Vynior's Case* (1), it will be seen that the position of the arbitrator was treated as that of an agent, and that, as death revokes the appointment of an agent, so also does it revoke the appointment of an arbitrator; and from the time of that decision down to the latest period in England, when the Act of 1889 was passed, we have, no doubt, a long line of cases in which the rule was applied in general terms, that the death of a party revokes the authority of an arbitrator. But I have looked into practically all the authorities that have been cited, and into a great number of others, and, with the exception of one case, which was cited by Mr. Bartley, and to which I shall afterwards refer, I cannot find a single case which determines that the rule applied when the contract was so framed as to make the award, not a collateral matter, but a part of the substantive machinery for ascertaining the amount of money to be paid—one without which it would be impossible that a cause of action could be sustained.

The case I refer to is that of *Blundell* v. *Brettargh* (2), and I wish to observe that it has not been answered by the case of *The Caledonian Railway Company* v. *Lockhart* (3), which was cited by Mr. O'Brien. No doubt, Lord Cranworth and Lord Wensleydale held in the latter case that, in the case of a contract to pay such a sum of money as should be ascertained by a third person, the death of one of the parties before such ascertainment does not, according to the common law, prevent the sum being ascertained. But the common law there referred to is plainly the common law of Scotland, which is not identical with the common law of England and Ireland. Another ground relied on was that certain clauses of the Lands Clauses Act were incorpo-

(1) 8 Rep. 81 b. (2) 17 Ves. 232. (3) 3 Macq. 808.

rated in the contract. Therefore that case may be put out of consideration here.

I may also say that two of the cases which were cited by Mr. White, *Piercy* v. *Young* (1) and *Forwood* v. *Watney* (2), which decide that it was not the agreement to refer to arbitration, but only the nomination of the arbitrator, which was revoked by death, do not assist us here. That has always been the law, because whenever the arbitration was revoked by a party an action was sustainable by the other party for the breach of the agreement to refer to arbitration; and therefore *Piercy* v. *Young* (1) decided nothing new. In the other case, *Forwood* v. *Watney* (2), the application was, in substance, for liberty to revoke the submission, and it was very properly held that it could not be allowed; but it prevents it being an authority in favour of this motion.

Blundell v. *Brettargh* (3) is the substantial ground for Mr. Bartley's answer to this application; and, unless that case can be distinguished from the present, I think he would be entitled to succeed in his opposition. Therefore, it requires to be carefully considered. Therefore, I proceed to analyse it as accurately as I can, and I honestly say that I do not think it would be followed at the present time; but I shall try to ascertain the real ground of Lord Eldon's decision, and I think it will be found to have been this, that he considered that the direction to deliver the award by the arbitrator to *the parties* contemplated delivery to them personally, as distinguished from delivery to their representatives. I agree that it is hard to arrive at that conclusion; I should not arrive at it from the report; but I think it will be found, on a fair review of the case as a whole, that that was the ground of the decision. The marginal note is this:

"Specific performance refused under a contract for sale at a price, to be fixed by arbitrators within a certain time, or, if they should not agree to make their award within the time, by an umpire, also within a limited time; the construction of the contract, requiring the delivery of the award in writing to each party, being, that, though the consequential acts executing the

(1) 14 Ch. D. 200. (2) 49 L. J., Q. B. 447. (3) 17 Ves. 232.

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conveyance, &c., might be done by representatives, it was, with reference to the terms, to be fixed by the award, *personal to the parties*; one of whom died before it."

Now, if he was right in holding that it was "personal to the parties," of course everything else followed. The clause was this:

"That the award of the said arbitrators, provided the same was made in writing under their hands and seals, ready to be delivered to each party on or before the 1st of July then next, or in case such arbitrators should not agree to make their award within the time limited, as aforesaid, then the award of such umpire, provided the same was made in writing, ready to be delivered to each party on or before the 1st of October, should be final and conclusive."

If I were deciding that case, I might have held that the words "each party" there included the heir-at-law; but undoubtedly I should have held that, if the contract was one relating to personal property, the word "party" included executor. That would have been the old law; that person includes an executor, but, *prima facie*, not an heir.

I do not think that I am going against that case when I refuse to apply the principle of it to a case, not of real estate, but of personal property; and when I find upon the face of the contract that the provision as to arbitration was not intended to be personal to the parties, or be merely collateral to the main purpose of the contract, but that the contract was to continue notwithstanding the death of either party, and I feel myself bound, notwithstanding that case, to hold that there was a contract to pay for this work, performed at a price to be ascertained in this mode, which must apply, irrespective of the circumstance of the death of either of the parties, to every case in which extra work is alleged to be performed.

That is the only case I can find in reference to a contract such as this; and being of opinion that the builder is entitled, under the contract, to be paid the price of this extra work, to be ascertained in the mode there described; and the Court having seisin of this case by reason of the application to set aside the award, and of the order remitting it; and the Court holding that

the matter is one within Order XVII., Rule 4, my opinion is that the order should go. I dare say I am wrong, in consequence of the difference of opinion that unhappily exists; but the parties are entitled to the benefit of the opinion I have formed.

I am therefore of opinion that, upon this application, an order should be made that the proceeding may be continued in the name of Annie Wells Donovan, the administratrix of James Donovan, deceased, omitting the name of the other applicant, Edward James Donovan.

JOHNSON, J.:—

I regret exceedingly that I am unable to agree with the judgment of the Lord Chief Baron. The general rule established by many authorities is that, by death of either of two parties to the submission before the award is actually made, the power of the arbitrator lapses unless the submission contains an agreement to the contrary. The authorities on the point are mostly collected in Russell on Arbitration (3rd ed.), p. 152; in Bythewood and Jarman, Conveyancing (4th ed.), vol. ii., p. 131, and in Chitty's Archbold's Practice (14th ed.), p. 1604. This present case was not a cause or matter in Court; and neither the Common Law Procedure Act nor the Judicature Acts and Rules provide for the present case. To avoid this inconvenience of the death of either party to the submission, Lord Eldon suggested a contract framed to meet this contingency: *Blundell* v. *Brettargh* (1); and Abbott, C.J., in *Cooper* v. *Johnson* (2), suggested that the submission should provide that the death of a party to the submission should not revoke the arbitrator's authority. This suggestion has usually been adopted by means of a special clause framed for the purpose; and Parliament, following on the same lines in the Consolidated Statutes of 1845, expressly enacted that the death of either party to the submission should not operate to revoke the authority of the arbitrator; see the Companies Clauses Act, 1845, s. 128; the Lands Clauses Act, 1845, s. 25; and the Railways Clauses Act, 1845, s. 126. In *Piercy* v. *White* (3), cited by Mr. White, the Court decided only that the question in dispute

(1) 17 Ves. 232. (2) 2 B. & Ald. 394. (3) 14 Ch. D. 200.

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between the parties did not come within the very brief and general submission with which that case is conversant—see p. 204 of the report. No question of the death of a party to the submission was involved in the decision; both the plaintiff who revoked the agreement and the defendant were living when the case was decided. In *The Caledonian Railway Company* v. *Lockhart* (1) the submission expressly provided that the proceedings should be in *strict conformity* with the *rules and regulations under the provisions and conditions specified in the Lands Clauses Act and the Railways Clauses Act.* Both these Acts, as I have already pointed out, provide expressly that the arbitrator's authority shall not lapse with the death of either party. Neither of the cases cited affects the general rule. The parties to the submission now before us abstained from inserting the usual clause, or any clause, in the submission, providing that the death of either party should not revoke the arbitrator's authority. The provisions in the contract for determining the prices of extras have, I think, by the act of God, ceased to be operative; and the representatives of the deceased party and the surviving party are therefore remitted to their respective rights under the ordinary law for the value of work done and accepted.

BOYD, J., concurred in the judgment of Palles, C.B.

Solicitor for the Rev. Joseph Burke: *W. J. Morris.*

Solicitors for Annie Wells Donovan and Edward J. Donovan: *Croker & Moran.*

J. C. W.

(1) 6 Jur. (N. S.) Eng. 1311; 3 Macq. 808.

THE KING *v.* QUINLAN (1).

K. B. Div. 1908.

Feb. 26.

Practice—County borough election—Prosecution for personation and improper dealing with ballot papers—Inspection, prior to trial, of ballot papers, counterfoils, and marked register—Subpœna to produce at trial, or any adjournment thereof—Form of order—Aldermen and Councillors of County Boroughs (Ireland) Election Order, 1898, *Schedule III., Articles* 40, 41, *and* 42.

A prosecution having been instituted against the presiding officer at a polling station during a county borough election for personation and other offences against the Ballot Act, 1872, as adapted by the Aldermen and Councillors of County Boroughs (Ireland) Election Order, 1898, the Court made an order directing the returning officer at the election to produce and show to the solicitor for the Crown rejected ballot papers, counted ballot papers, spoiled ballot papers, relating to the election, the counterfoils thereof marked by the presiding officer at the polling station, and the marked copy of the register used at the polling station. The Court also gave leave to issue a subpœna *duces tecum*, directed to the returning officer, to produce the said documents at the trial or any adjournment thereof.

R. v. *Beardsall* (1 Q. B. D. 452) followed.

MOTION *ex parte* on behalf of the Crown for an order for the production for inspection of certain ballot papers and other documents relating to a county borough election, and for a subpœna for their production at a criminal prosecution.

A prosecution under sect. 3 of the Ballot Act, 1872, was instituted by the Crown against one Nicholas Quinlan for personation and certain other offences in respect of a ballot paper, which offences were alleged to have been committed by him at the election of town councillors for the Centre Ward of the borough of Waterford held on January 15, 1908. The solicitor for the prosecution made an affidavit stating that the inspection of the following documents prior to the trial, and also their production at the trial, would be required for the purpose of instituting or maintaining the prosecution of the said Nicholas Quinlan:—

(1) Before KENNY, J.

K. B. Div. 1908.

THE KING v. QUINLAN.

(1) Rejected ballot papers relating to the election; (2) Counterfoils of ballot papers marked by the presiding officer at No. 1 booth, Centre Ward, relating to the election; (3) The counted ballot papers relating to the election; (4) Spoiled ballot papers relating to the polling station at which the said Nicholas Quinlan acted as presiding officer; (5) The marked copy of the register used at the said polling station. As to this last-mentioned document, the deponent stated that he had applied to the town clerk of Waterford to produce the document, and that the latter had refused to do so, on the ground that no regulations for the purpose had been made under the Aldermen and Councillors of County Boroughs (Ireland) Election Order, 1898, Schedule III, Article 42.

Battersby, K.C., for the Crown :—

An order such as that for which I apply was made in *R.* v. *Beardsall* (1); and it was held that the documents could be given in evidence in a trial for offences against the Ballot Act, 1872. That Act has been adapted and applied to county borough elections by the Aldermen and Councillors for County Boroughs (Ireland) Election Order, 1898. The Court has jurisdiction under Articles 40, 41, and 42 of Schedule III. to that Order to grant this application.

KENNY, J. :—

I shall grant an order for the inspection of the documents by the solicitor for the prosecution; and shall give leave to issue a subpœna *duces tecum* directed to the town clerk of Waterford to produce the documents at the forthcoming trial, or any adjournment thereof.

The Court made the following order :—

"IN the matter of a prosecution against Nicholas Quinlan for personation and other offences against the Ballot Act, 1872, as adapted by the Local Government Board (Ireland) Election Order of February 22nd, 1898, alleged to have been committed by him, as presiding officer, at the election for town councillors for the Centre Ward in

(1) 1 Q. B. D. 452.

the borough of Waterford, held on January 15th, 1908. Upon hearing Mr. Battersby, K.C., senior Crown counsel for the city of Waterford, and being satisfied by evidence on oath that the inspection and production of the undermentioned documents are required for the purpose of instituting or maintaining a prosecution against the said Nicholas Quinlan for an offence or offences in relation to a ballot paper: It is ordered that Mr. James J. Feely, the town clerk for the said borough of Waterford, do produce and show for inspection to Henry Robert Tweedy, the Crown solicitor for the county of the city of Waterford, or any person appointed by him in writing for that purpose, on Monday, the 2nd day of March, 1908, at such hour as the said town clerk shall appoint, and such other days and hours as may be convenient to the said town clerk, at the city courthouse in the said borough, the undermentioned documents and papers; and also, after being served with a summons or subpœna for that purpose, do produce and show the same for inspection at any time or times as may be required under summons or subpœna at the forthcoming Assizes in the city of Waterford, to be held on the 14th day of March, 1908, upon the prosecution of the said Nicholas Quinlan for the said offences, or at any adjournment of the said prosecution, as evidence for the purpose of maintaining the said prosecutions against the said Nicholas Quinlan for the offences aforesaid:—(1) The rejected ballot papers relating to the said election for the Centre Ward; (2) the counterfoils of the ballot papers marked by the presiding officer in No. 1 booth Centre Ward relating to the said election; (3) the counted ballot papers relating to the said election; (4) the spoiled ballot papers relating to the same polling station. And it is further ordered, for the purpose aforesaid, that the said town clerk do cause to be opened the sealed packet containing the said rejected ballot papers, the counterfoils of the ballot papers used at polling station No. 1 Centre Ward relating to the said election, the marked copy of the register used in the same polling station, the counted ballot papers and spoiled ballot papers relating to the same polling station at the said election, and do break any seal or seals which may be necessary for the purposes aforesaid; and that the said town clerk do, by himself or by some person or persons to be by him appointed for that purpose, attend at such production and inspection during the whole time thereof. And further, that the said town clerk, or any such other persons, shall take and use all such proper means and precautions as he shall deem necessary, in order that the mode in which any particular elector has voted shall not be discovered; and in order that the said documents and papers so to be produced and inspected shall be safely kept from loss, damage, or other matter or

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thing whereby the same, or any of them, shall be injured, prejudiced, or altered in any way, It is further ordered that the said town clerk shall, immediately after each such production and inspection, return the said documents to their packets, and re-seal the same. It is further ordered that the persons entitled to be present at the said inspection are the town clerk and his assistants, the said Henry Robert Tweedy, or such person as he shall nominate, and the said Nicholas Quinlan and his solicitor or agent, and the Worshipful Mayor of Waterford. And it is lastly ordered that no person shall be allowed to see the face of any counted ballot paper. A copy of this order shall be served on the said Nicholas Quinlan or his solicitor, and on the said town clerk."

Solicitor for the Crown: *H. R. Tweedy.*

J. C. W.

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Feb. 28.

PEMBROKE URBAN DISTRICT COUNCIL ELECTION PETITION. REDMOND AND OTHERS, PETITIONERS; MANLEY AND OTHERS, RESPONDENTS (1).

Practice—Local Government election petition—Inspection of documents—Form of order—Urban District Councillors and Town Commissioners (Ireland) Election Order, 1898, Schedule III., Article 42.

In a petition against the election of councillors for an urban district, where no regulations have been prescribed by the council of the county in which the urban district is situate as to documents in the custody of the returning officer, other than ballot papers and counterfoils, being open for public inspection, the Court will grant an absolute order for the inspection of such documents.

MOTION for an order for inspection of documents, other than ballot papers and counterfoils, in the custody of the returning officer of an urban district.

Certain Local Government electors in the Pembroke Urban District brought an election petition against the election of councillors for the district, on the ground that the returning officer had not provided a sufficient number of polling places; and also that an excessive number of polling agents had been

(1) Before KENNY, J.

employed at the election by certain of the councillors who had been elected. The petitioners desired to inspect the documents, other than ballot papers and counterfoils in the custody of the returning officer, but no regulations as to the inspection of such documents had been made under Schedule III, Article 42, of the Urban District Councillors and Town Commissioners (Ireland) Order, 1898. An affidavit was filed by the solicitor for the petitioners, stating that an application for inspection of the marked register had been refused, and that its inspection was necessary for the purposes of the petition.

W. M'Grath, for the petitioners:—

This application is limited to an order for the inspection of documents other than ballot papers and counterfoils in the custody of the returning officer. As no regulations for their inspection by the public have been made, the petitioners are forced to apply to the Court. An application similar to the present was granted in *James* v. *Henderson* (1) and in *Stowe* v. *Joliffe* (2). [KENNY, J.: Were the orders in those cases conditional or absolute?] The orders were in the first instance conditional, but they were made absolute. In *James* v. *Henderson* (1) counsel in support of the rule was not called on. Coleridge, C.J., said it was a very clear case.

KENNY, J.:—

I think this is a proper case in which to grant an absolute order for the production of these documents for inspection by the petitioners.

Solicitor for the petitioners: *M. J. O'Farrell.*

J. C. W.

(1) 43 L. J., C. L. 238. (2) *Ibid.* 173.

Appeal.
1907.

Nov. 28, 29.
Dec. 2, 18.

THE KING (TIGHE) *v.* THE COUNTY COUNCIL OF MAYO (1).

Local Government—Baronial guarantee—Guaranteeing area—Arrears due to county fund—Retrospective rating—Estimate for current year—Irish Tramways Act, 1883 (46 *&* 47 *Vict. c.* 43), *ss.* 6, 7—*Local Government* (*Ireland*) *Act*, 1898 (61 *&* 62 *Vict. c.* 37), *ss.* 47, 57, 80—*Local Government* (*Ireland*) *Act*, 1900 (63 *&* 64 *Vict. c.* 63), *s.* 2—*Local Government* (*Adaptation of Enactments*) *Order, Article III.—Public Bodies Order*, 1904, *Articles* 66-69.

A County Council has power to assess an area which is liable to a baronial guarantee under the Tramways (Ireland) Act, 1883, for an amount, to be estimated and raised as poor rate, but as a separate item thereof, sufficient to cover—(1) a debit balance carried forward against the guaranteeing area from previous years, and (2) a sum estimated as sufficient to meet the certificates expected to be presented during the current financial year; as well as the sum required to recoup the county funds for the amount of the certificates actually presented and paid in the current financial year.

By a presentment made at the Summer Assizes of 1885, the Grand Jury of the County of Mayo, pursuant to the powers of the Tramways and Public Companies (Ireland) Act, 1883, guaranteed a dividend at the rate of £4 per cent. on so much of the share capital of the Ballinrobe and Claremorris Railway Co. as was for the time being paid-up capital as defined by the said Act. The guarantee was made chargeable upon the barony of Kilmaine, and so much of the barony of Carra as was comprised in the parish of Ballyovie. This presentment was duly confirmed by Order in Council, dated the 19th May, 1890. In each year from the opening for traffic of the said railway in or about 1893 or 1894 down to the transfer of the duties of the Grand Jury to the County Council of Mayo under the Local Government Act, 1898, certificates pursuant to the 6th section of the said Act of 1883 were under sect. 7 thereof presented to the Grand Jury, and the amounts thereby certified to be due were duly presented.

(1) Before The Lord Chancellor, and FitzGibbon and Holmes, L.JJ.

The Board of Works, pursuant to sect. 9 of the said Act of 1883, contributed one moiety of the sums certified under sect. 6, and such moiety was duly credited against the total sums raisable under the certificates.

When the County Council first came into office in April, 1899, and held its first meeting on the 22nd April, 1899, there was standing against the guaranteeing area, in respect of the railway, a sum of £1233 1*s.* 1*d.*, dividend to the 31st of October, 1899, and a sum of £1303 12*s.* 10*d.* to the 30th of April, 1899, a week after the first meeting, making in all a sum of £2536 13*s.* 11*d.*, of which the Board of Works was to contribute half. To meet this debt a rate of one shilling in the £1 should have been then assessed; but instead of that a rate of 2½*d.* in the £1 was struck. The amount necessary to satisfy the guarantee was paid out of the funds of the county at large, and a balance had since been carried forward every year against the guaranteeing areas, which appeared in the "Separate Charges Account."

At the end of the half-year ending the 30th September, 1906, the balance against the guaranteeing area amounted to £1885 4*s.* 9*d.* At the commencement of 1907 the Mayo County Council struck a rate of 1*s.* 3*d.* in the £1 for the financial year ending 31st March, 1908, for the purpose of raising—(1) the aforesaid balance of £1885 4*s.* 9*d.*; (2) £1200 for railway charges paid out of the county funds in respect of the said guarantee in the year 1906–1907; and (3) £1200, being the sum estimated as necessary to meet similar railway charges for the year 1907–1908. The estimate upon which this rate was based was adopted by the County Council by a resolution dated the 16th February, 1907. Notice of intention to make the rates was published on the 20th March, 1907; and notice of the rates having been made was published on the 20th April, 1907.

On the 9th July, 1907, the Ballinrobe Rural District Council obtained a conditional order for a writ of *certiorari* to quash the rate, as being excessive. In Michaelmas Sittings, counsel for the prosecutors moved to make the order absolute. During the argument it was suggested that the Ballinrobe Rural District Council could not properly be prosecutors, as they were not ratepayers; whereupon, on consent of both parties and of Mr. Tighe given in

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open Court, it was ordered that Thomas Tighe be substituted as prosecutor throughout the proceedings instead of the Ballinrobe Rural District Council. On the 11th November, 1907, the King's Bench Division (Palles, C.B., and Johnson and Wright, JJ.) gave judgment in favour of the prosecutor (1). The order made by the Court directed that a writ of *certiorari* should issue directed to the County Council of the County of Mayo to remove into the King's Bench Division for the purpose of being quashed "all and singular the rate made by the said County Council on or about the 20th April, 1907, assessing a rate of 1*s.* 3*d.* in the £1 sterling as and for a separate charge for the year ending 31st March, 1908, in respect of the Ballinrobe and Claremorris railway upon the area mentioned in the order of His Excellency the Lord Lieutenant and Privy Council of Ireland, dated the 19th May, 1890, viz., the barony of Kilmaine, and so much of the barony of Carra as is comprised in the parish of Ballyovie in the County of Mayo."

From that order the County Council appealed.

Ronan, K.C., *Clancy, K.C.*, and *Muldoon*, for the appellants :—

If a rate is struck, and the assessment made and acted upon, it cannot be set aside on *certiorari*, unless the person aggrieved moves to quash it at once : *In re Listowel* (2). In this case the assessment was made on the 16th February, 1907, and nothing was done to quash it until the 9th July.

Prior to the passing of the Local Government Act there were two taxing bodies in Ireland—(1) the Grand Jury ; (2) the Poor Law Guardians. Their method of taxation was different : the Poor Law Guardians struck one rate for the whole year ; the Grand Jury made separate assessments for different purposes ; and there was no general presentment for the whole. There was no such thing as a general county cess ; they were a series of separate acts of taxation ; and the whole was simply an addition of the different items. When the Local Government Act was passed in 1898, it was necessary to adopt one or other, and the Poor Law system was adopted. Once it was enacted that the money to satisfy

(1) Reported 41 Ir. L. T. R. 24. (2) I. R. 9 C. L. 46.

the guaranteed dividend was to be collected the same way as poor-rate, the machinery and provisions of the Tramways (Ireland) Act, 1883, became inapplicable. Section 1, sub-sects. 2 and 3, of the Tramways Act shows that the charge for the tramways was to be made by putting a charge on the baronies. Section 6 provides that for the purpose of ascertaining the gross receipts and the net receipts from the tramway in each half-year, and the amount which the guaranteeing baronies are liable to contribute, arbitrators were to be appointed, who should certify the amount; and the certificates shall be binding on the Grand Jury, the baronies, and the Company; and immediately after delivery of such certificates to the secretary of the Grand Jury, the baronies and the Company shall be liable for payment of the sums specified. Sect. 7 enacts that the sums mentioned in the certificates are to be presented by the Grand Jury, and paid by the county treasurer in the way prescribed by 6 & 7 Wm. 4, c. 116; and if the Grand Jury fail to present the sum, the treasurer of the county shall insert such sum in his warrant, and the treasurer shall pay over the amount when received by him. It is impossible to make that machinery applicable now. By Article III. of the Adaptation of Enactments Order, for "Grand Jury" there shall be substituted "County Council," for "Grand Jury cess" "Poor-rate," &c., but section 7 of the Tramways Act, 1883, could not be adapted. Once a specific Assizes was gone, then under the old system all power is at an end. If a rate is struck in April and levied in June, it is the occupiers in June who have to pay. If the contention of the prosecutor is right, then, if the Grand Jury omitted to make the presentment, or if the treasurer omitted to certify, or if the County Council omitted to levy the rate, the baronial guarantee would be destroyed.

By section 57, sub-section 2, of the Local Government Act, 1898, railway charges are to be separately estimated and raised by means of the poor-rate. That is inconsistent with section 7 of the Tramways Act, 1883. By section 47, sub-sect. 3, in the county fund separate accounts are to be kept of all receipts and payments in respect of county, union, urban, and district charges, and if there is not sufficient to the credit of any of these to meet the demands payable thereout, the County Council shall raise the

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deficiency by means of poor-rate. This is an imperative presentment within section 80, sub-sect. 1, as a payment "required to comply with any enactment." By Article XXI. of the Application of Enactments Order, an estimate must be made of the charges to be paid during the current financial year. The poor-rate must be struck in advance: section 51, sub-sect. 6; and may be struck for the whole year under section 2 of the Local Government Act, 1900. These provisions are wholly inconsistent with the view that a special rate must be struck to meet railway charges as they fall due and are certified for payment.

A County Council may strike a rate one year to meet demands payable at the beginning of the next financial year: *Rex.* v. *Holywood Urban District Council* (1). It is lawful to strike a retrospective rate to meet a deficiency: *Murphy* v. *Belmullet Guardians* (2); *Reg.* v. *Omagh Guardians* (3). Any statute that affects public rights is, so far as time is concerned, directory only and not mandatory: *Grove* v. *M'Elhinney* (4); *Reg.* (*Wrice*) v. *Monaghan Urban District Council* (5).

Serjeant O'Connor, K.C., G. Fetherstonhaugh, K.C., and *Rynd*, for the prosecutor:—

The two sums of £1885 4*s.* 9*d.*, and £1200 to meet the estimated railway charges for the year ending March, 1898, cannot be included in the rate, and consequently the rate of 1*s.* 3*d.* in the £1 is excessive. Sections 6 and 7 of the Tramways Act of 1883 have not been repealed, and are still in force; and in order to comply with them, there must be—(1) a certificate from the arbitrator; (2) the levying of the rate; and (3) the receipt of the money by the treasurer. Until these three steps have been taken, and the money actually received, the amount cannot be recovered. By Article III. of the Adaptation of Enactments Order, for "Grand Jury" there shall be substituted "County Council," for "Secretary of the Grand Jury," "Secretary of the County Council," and for "Assizes" and "Presenting

(1) [1905] 2 I. R. 154.
(2) 22 L. R. Ir. 215.
(3) 26 L. R. Ir. 619.
(4) 30 L. R. Ir. 53.
(5) 5 New Ir. Jur. Rep. 73.

Term," "Quarterly Meeting of a County Council," "provided that this substitution shall not increase the amount which may be expended in any year for any purpose." So far as the sum of £1885 consisted of money which ought to have been raised in some former year, it has been illegally paid, as it was barred by section 51, sub-sect. 7, of the Local Government Act, 1898. It was a voluntary payment by the County Council, in their own wrong, and they cannot recover it.

As to the sum of £1200, the amount computed as necessary to be raised for railway charges for the year ending 31st March, 1908, the secretary of the County Council must have the certificate before him, before he inserts the amount in the warrant, and he is only to pay the amount *when received by him.* Section 47, sub-sect. 3, only applies to moneys that are legally payable, and does not apply to railway charges; but there is no right to sue until the money is received. The payment, if made, would be illegal, and mandamus would not lie. Section 51, sub-sect. 6, applies only to the expenses mentioned in that section, and railway charges are not included. It was contended on behalf of the County Council that these sums of money come within section 80 of the Local Government Act; we say they cannot come within the words of that section until the money is raised.

The Application of Enactments Order was made in pursuance of section 104 of the Local Government Act, for the purpose of making applicable to this country a number of English Acts. The Adaptation of Enactments Order was made in pursuance of section 105, for the purpose of adapting a number of Irish Acts. There is nothing in England to correspond with the Tramways (Ireland) Act, 1883, and so Article XXI. of the Application of Enactments Order does not apply.

The judgment of the Court of Appeal was delivered by :— Dec. 18.

FITZ GIBBON, L.J. :—

This proceeding was instituted, and up to the order under appeal it was carried on, by the Ballinrobe Rural District Council, for the purpose of quashing an assessment described as "the rate made by the County Council on or about the 20th day

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of April, 1907, assessing a rate of 1*s.* 3*d.* in the pound as and for a separate charge for the year ending 31st March, 1908, in respect of the Ballinrobe and Claremorris Railway, upon the barony of Kilmaine and so much of the barony of Carra as is comprised in the parish of Ballyovie in the County of Mayo." It is not disputed that this area has been duly made liable to guarantee the working expenses, and a dividend on certain share capital of the Railway, under the Tramways Act, 1883. Some question being raised as to the *status* of the Ballinrobe Council as prosecutor, the King's Bench, by the order under appeal, on consent of both parties and of Mr. Thomas Tighe, "substituted" him "as prosecutor throughout the proceedings herein" instead of the Ballinrobe Council. It appears to us to be contrary to the intention of this consent that the County Council should now be permitted to rely upon laches, acquiescence, complicity, or other personal considerations of Mr. Tighe, as a defence against any just complaint of the Ballinrobe ratepayers, and we therefore consider the case upon its merits.

In the King's Bench the evidence of the alleged "rate" was a certificate, dated July 10, 1907, signed by George B. Virtue, describing himself as "acting secretary," "that the rate therein of 1*s.* 3*d.* in the pound set out as having been struck by the County Council for the Railway, to be levied off the guaranteeing area, was so struck by the Council on the 30th April last, and that this certificate is a true and correct copy of said rate." The certificate is on a sheet of "Form 25," headed "Estimate of rates to be levied in the financial year ended 31st day of March, 1908, in respect of separate charges in the several Rural Districts, and of the amounts to be paid in respect of same by the Councils of Urban Districts within the county of Mayo"; but nothing whatever is written into the Form, except "25" under the heading "No. in Separate Charges Register"; "Ballinrobe and Claremorris" under "Names of Districts included wholly or partly in the contributory place"; "£54,509" under "Net valuation of tenements which are liable" and "Apportionment of estimated current expenditure"; and "15*d.*" under "Rate in the pound required to raise same." It is difficult to believe that the order under appeal would have been made, at least in its

present form, if the prosecutor had been required to identify, or the Council to produce, the "rate" which was impeached; or if the Court had been asked to specify what was to be done in the Crown Office, under the direction in the order appealed from "that the said rate be quashed on return without further order." Having required the original documents relating to this "rate" to be produced, we find it possible to segregate the figures relating to it from the other contents of the complicated and voluminous accounts, books, and documents, which culminate in "the poor-rate for the County Mayo for the year ending 31st March, 1908," of which the disputed assessment is one component, which by the Local Government Act, 1898, sect. 57 (2), is "to be separately estimated and raised by means of the poor-rate, but as a separate item thereof." With the aid of the affidavits, we further find it possible to appreciate the arguments addressed to us, and to deal with this assessment of 1*s.* 3*d.* on Kilmaine and Ballyovie, as if it was a fit subject for *certiorari*, without disturbing any other part or item of the poor-rate. But, in taking this course, in order to decide the question which this litigation was intended to raise, we do not hold that any or every "separate item" of a county poor-rate can, by itself, be quashed on *certiorari*, nor do we venture to anticipate the possibility, or the consequences, of such an operation.

The main subject of contention is how far the provisions of the Tramways Act, 1883, for raising baronial guarantees by county cess can be reconciled with the provisions of the Local Government Act, 1898, for separately estimating and raising them "by means of the poor-rate." The concrete question is whether the amount which the Council has included in the poor-rate for the financial year ending March 31, 1908, to meet the Ballinrobe guarantee, is excessive and void, as including items which could not be legally raised in that year.

The estimate includes three principal sums, viz.—

(1) A debit balance of £1885 4*s.* 9*d.*, carried forward against the guaranteeing area from previous years, at foot of the "Separate Charges" account.

(2) A sum of £1200 required to recoup the county funds for the

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amount of the railway certificates presented and paid in the financial year ending March 31, 1907; and

(3) The estimated sum of £1200 to meet the certificates expected to be presented during the current financial year.

The prosecutor contends that (1) cannot now be assessed, because the time has gone by for doing so; and that (3) cannot be assessed, because it cannot be levied until it has been certified; and he therefore contends that (2) only should have been included in the poor-rate for the current year. If all three sums are leviable, it will take 1*s.* 3*d.* in the £1 to pay them—if otherwise, the rate is excessive.

The Tramways Act, 1883, sect. 6, enacted that on delivery to the secretary of the Grand Jury of the prescribed certificate, showing the deficiency chargeable under the guarantee for each half-year, the baronies should be liable to pay the sum certified. Sect. 7 enacted that the secretary should lay each certificate before the Grand Jury, at the Assizes next after he received it, and that the Grand Jury should thereupon present the certified sum, to be raised and levied in manner provided by the Grand Jury Acts. If the Grand Jury failed to do so, the county treasurer was directed to insert such sum in his warrant, whereupon it was to be levied and raised, and the treasurer was to pay over the amount, *when received by him*, as if such money had been presented by the Grand Jury at the same Assizes.

The King's Bench has held that, under this Act, the liability of the baronies to pay did not arise until the money had been levied; that the Act gave a specific remedy against a specific fund; and that nothing could be done now, over and above what was provided by the words of the sections which I have read. It further held that the Local Government Act, 1898, throws no further or different liability upon the tax-payers in respect of these baronial guarantees than what obtained when the Grand Jury presented for them, and that the power of the County Council to include the guarantee in the poor-rate only arises upon the production of the certificate.

It is not quite clear, upon the Chief Baron's judgment, whether he also decided that the balance carried forward from previous

years could not now be raised, *i.e.*, that no subsequent assessment can be made upon a guaranteeing area to reimburse the county fund for money paid by it, which ought to have been levied off the guaranteeing area within the half-yearly or, at most, the yearly period following the issue of the certificate. Whether he so decided or not, the impeached assessment cannot be sustained unless we can hold that the power of recoupment exists as to the balance of £1885 4*s.* 9*d.*, carried forward from the financial years before that ending on March 31st, 1907.

Before passing from the Act of 1883, it is material to observe that section 9 provides that the Treasury contribution to the guarantee is not payable until after the barony has paid the full amount of the certificate. It is only then that the Treasury may authorize the payment to the treasurer, to be put to the account of the barony, of a sum not exceeding one-half the sum paid by the barony during the half-year. It is plain that the guaranteeing area must provide for the payment, in the first instance, of the *total* certified amount, though half of it may afterwards be recouped by the Treasury.

The payment of each guaranteed dividend to the shareholders is proved by the secretary of the Company to be made about a year after its accrual, because the certificate cannot ascertain the deficiency until after the audit of the half-year's accounts, after which the certificate must be delivered to the county treasurer, and he must be authorized to pay the money. Under the Act of 1883, the presentment became compulsory at the next Assizes after the delivery of the certificate, and the payment became compulsory as soon as the money was levied.

It is admitted that, under the new system as under the old, the Railway Company can demand no money until the certificate for it has been produced; therefore no greater or different liability is thrown upon the ratepayers now from that which existed under the Grand Jury system.

But the Council contends that the changes consequent on the abolition of the Grand Jury, and the transfer of the baronial charge from county cess to the poor-rate, and the system established by the Local Government Act, 1898, and the provision for one annual poor-rate, under the Local Government Act,

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1900, have so altered the time and manner of assessing and levying the money required for baronial guarantees as to make it the duty of the Council to estimate the amount in advance, and to include it in the poor-rate, so as to raise it, and have it in hand, to meet the certificates which may come in during the year for which the poor-rate is struck.

As to the "retrospective" items, the Council contends that when the full amount required to pay the guarantee has not been raised off the guaranteeing area, and when it has been paid out of the county fund, the estimate for the subsequent year must provide for its reimbursement by the guaranteeing area which ought to have paid it in the first instance.

The secretary of the Railway Company proves that the Company's accounting periods end on April 30th, and October 31st; the accounts are audited, and the certificates issue, by the end of June and December, and payment becomes compulsory at the next meetings of the contributories, including the Mayo County Council. The Council contends that, to carry out the present system, the service of the financial year ending March 31st, 1908, should include provision for two half-yearly certificates, of which the first is presentable at the next meeting after June, and the second at the next meeting after December, 1907. The proceedings for estimating the poor-rate begin in January and must be finished in March, and the rate for the year ensuing must be struck in April. The contentions of the prosecutor being —(1) that no money is leviable for a baronial guarantee until the certificate ascertaining the amount is presented, and the amount levied; (2) that no retrospective rating can be made after the end of the year in which the certificate has been presented; it would follow from (1) that the latest charges on foot of the Ballinrobe Railway guarantee, that could come into the poor-rate struck on April 30th, 1907, for the year ending March 31st, 1908, would be the amount of the certificates which issued in June and December, 1906, showing the deficiencies for the half-years ending April 30th, and October 31st, 1906; and it would follow from (2) *either* that the Company could not receive the amount of the guarantee for the half-year ending April 30th, 1906, until after the rate struck on April 30th, 1907, had been levied, *or* that if the

Council was compellable to pay the amount out of other funds, the guaranteeing area could never afterwards be rated to recoup it.

This looks very like a *reductio ad absurdum* of the prosecutor's contention, if the guarantee is, as the Act of 1898, section 57 (2), expressly enacts, "to be separately estimated and raised by means of the poor-rate."

Before considering the statute, it is well to mention how the baronial guarantee has been dealt with since the Act of 1898 came into operation. The certificates have been presented to the Council at the quarterly meetings next after their issue, and regularly paid in due time afterwards, by cheques against the county fund, which cheques were debited to the "Separate Charges Account" of the guaranteeing area. The County has neither gained nor lost by this mode of payment, and the Treasury moiety has thereby been made payable, received, and credited to the same account. If in each year, when framing their estimate, the Council had assessed the guaranteeing area with a sum sufficient to pay the charge, an average rate of about 6*d.* in the pound over the last nine years would have been required to raise the guaranteed contribution off the barony. But this was not done, and hence this litigation. In 1899 the rate was struck at 2½*d.*, and a large deficit resulted. For the year ending March 31st, 1901, when the Council had adopted an annual poor-rate, it was struck at 1*s.*, by which the debit against the Separate Charges Account was reduced, but in the succeeding years down to March 31st, 1907, the rate ranged from 7*d.* to 3*d.*, and—with fluctuations—the debit against the Separate Charges Account had risen on March 31st, 1907, to £1885 4*s.* 9*d.*, exclusive of the £1200 required to meet the certificates presented during the year then ending.

The estimate for the rate now impeached was based, as I have stated, upon the requirement of money to meet (1) this £1885 4*s.* 9*d.*, (2) the £1200 paid on the certificates for the year ending March 31, 1907, and (3) the further £1200 estimated as required to meet the certificates for the year now current. As to this last sum the secretary swears—"Under the Public Bodies Order the estimate for the expenditure must be, and is, prepared

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by me in February for the year from March 31st next following till March 31st in the next year, so that I have to estimate a complete year in advance, as to which I have no exact information, except so far as I can form an opinion as to the probable amount. My estimate for the year was always reduced, and the representatives of Ballinrobe pressed the Council that a low estimate would be sufficient: on one occasion Mr. Tighe stated that there was a prospect of the railway paying, and that 3*d.* in the pound would be sufficient."

On the last occasion, in April, 1907, for the first time the rate was fixed at 1*s.* 3*d.*, a sum sufficient to discharge the liability of the area, as well for the current year and the year preceding, as upon the debit at foot of its "Separate Charges Account," and I now refer to the statutory authority to thus make this defaulting area pay up. The Adaptation Order, 1899, sect. 3, substitutes County Council for Grand Jury, and quarterly meeting for Assizes, thereby making the levy compulsory at the quarterly meeting next after the presentation of each certificate.

The Act of 1898, sect. 80 (1), compels the treasurer to pay out of the first moneys under his control, whenever the Council fails to pay, any sum which it is by any Act required to pay. This provision takes the place of that which required the county treasurer to insert the amount of the certificate in his warrant if the secretary failed to present it.

The same Act (sect. 57 (1) and (2)) includes baronial charges among those which are to be separately estimated and raised by means of the poor-rate, and extends to such charges all the provisions with respect to the poor-rate, with the necessary modifications, provided (sub-sect. (2) par. (b)) that the amount may be raised as heretofore off any area, though less than a district, and for that purpose there shall be a separate account in the county fund.

The Local Government Act, 1900, to be read as one with the Act of 1898, provides that, notwithstanding sect. 51 of the principal Act, the Council may either immediately prior to, or at the beginning of each local financial year, make one poor-rate for the whole financial year, and collect the same in equal moieties, one moiety for each half-year.

This the Mayo Council has done in every April since 1901.

The Local Government Board Order of December 17, 1904, requires the clerk of every District Council, before each January 15, to submit his estimate of the liabilities and requirements of such Council to be provided for by the County Council during the next ensuing financial year.

Article 67 of the same Order requires the secretary of the County Council, not later than February 8, to prepare an estimate of the amounts in his opinion required during the next ensuing financial year to provide for the liabilities and requirements of the Council itself, and also the sums to be supplied to other public bodies.

Article 68 requires the County Council to consider these estimates, and afterwards to assess the poor-rate thereupon, give notice of the rate, and ultimately to make it.

These provisions are, in our opinion, inconsistent with the decision that the County Council cannot assess or levy money to meet certificates for baronial guarantees presentable during the next ensuing financial year, until after those certificates have been actually issued. Counsel for the prosecutor have suggested that a separate rate should be struck for the amount of each certificate as it came in; but this suggestion is inconsistent with the provision that baronial railway guarantees "shall be separately estimated and raised by means of the poor-rate, but as a separate item thereof," and it is equally inconsistent with the provisions of the Act of 1900, for making and collecting one poor-rate in advance for each whole financial year. Even if there had been no balance against the guaranteeing area at the commencement of the current year, the County Council was bound under these enactments to provide in their estimate, and by the rate struck for the year ending March 31, 1908, an amount sufficient to meet the railway certificates which were expected to come in for that year, and sufficient to pay the full sum in the first instance, so as to enable the Council to claim the Treasury contribution.

For these reasons we hold the rate now impeached to have rightly included the amounts estimated as required to meet the certificates presentable at the first quarterly meetings after June and December, 1907.

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These, amounting to £1200, are item (3) in the impeached estimate and rates.

As to the other items (1) and (2), viz. the amount of the certificates which came in and were paid out of the county fund during the year ending March 31, 1907, and the debit balance at foot of the Separate Charges Account of the Ballinrobe district at the beginning of that year, it must be pointed out that the Railway Company has been paid, that we have therefore nothing to do with the question whether it could enforce payment after the close of any period; the creditor now is the county fund, and the debtor is the guaranteeing area, and the debt is the accumulated amount of moneys which the county fund has paid, under compulsion of law, in discharge of a liability which ought to have been assessed upon and raised off the guaranteeing area. It appears to us that the power to levy these amounts is clearly given by sect. 47 (3) of the Act of 1898:—

> "In the county fund separate accounts shall be kept of all receipts and payments in respect of county at large, union, urban, and district charges, respectively; and if the amounts standing to the county fund on account of any of those charges are insufficient to meet the sums payable in respect thereof, including the sums required to reimburse the treasurer for sums by law payable by him thereout,"

—which plainly include imperative presentments under sect. 80 (1)—

> "the County Council shall raise the deficiency in manner provided by this Act by means of the poor-rate; and the poor-rate shall be levied, where the deficiency is in respect of union, urban, or district charges, off the union or district, as the case requires."

If in any year it had been anticipated, as might easily happen, that the earnings of the railway would pay the full dividend, nothing would appear in the estimate, and nothing would be levied. But if the deficiency afterwards occurred, and the certificates were presented, and the treasurer was compelled to pay the money out of the county fund under sect. 80 (1), he plainly must re-imburse it under sect. 47 (3) by estimating and raising it off the guaranteeing area as an item of a subsequent poor-rate.

We hold that the impeached rate rightly includes the amount of the certificates paid out of the county fund in ease of the

Ballinrobe guarantee during the year ending March 31, 1907, and also the accumulated deficit carried forward from previous years, as a debit to the Ballinrobe Separate Charges Account at the beginning of that year.

There is, in our opinion, no legal objection to the impeached estimate or rate for raising a sum sufficient to discharge the liability of the guaranteeing area, which has been too long thrown upon the rest of the county by the insufficiency of the rates hitherto annually levied to meet the Ballinrobe guarantee.

The changes effected by the transfer of the guarantee charges under the Act of 1883, from the county cess and the Grand Jury to the poor-rate and the County Council, do not involve any additional liability on the ratepayers. They are consequential on the substitution of a continuous taxing authority for one which existed only during the Assizes, and on the provision for one annual poor-rate, assessed and levied in advance, as the means of meeting county and district liabilities accruing throughout the year.

We cannot go into figures, and it may be that when the Treasury contribution is received, the separate account of the Ballinrobe district will, for the first time in its history, show a credit balance at the close of the current financial year. But if so, the benefit will go to that area when next year's estimate is made, and the present heavy levy is but the deferred discharge of a liability which has been too long escaped at the cost of the rest of the county. The appeal, and the cause shown against quashing the rate, must be allowed, and the conditional order must be discharged, but, having regard to the way in which the present prosecutor was substituted at the eleventh hour, to the action of the County Council in so long striking insufficient rates, and to the way in which it was left to this Court to bring out the evidence necessary for a decision, we will not make any personal order for costs against Mr. Tighe. The County Council, the District Council, and the prosecutor, will abide their own costs in the King's Bench and here.

Solicitor for the prosecutor : *Alfred B. Kelly.*
Solicitor for the Mayo County Council : *J. F. Kirwan.*

R. D. M.

K. B. Div. 1908. Jan. 27–29. Feb. 3.

THE KING (at the Prosecution of GEORGE LOVETT BENNETT) *v.* THE COUNTY COUNCIL of the KING'S COUNTY and the TREASURER of said COUNTY COUNCIL (1).

Criminal injury—Decree awarding compensation—County Council—Financial year—Estimates—Local Government (Ireland) Act, 1898, *sects.* 5, 80—*Public Bodies Order*, 1904—*Mandamus.*

On the 29th May, 1907, B. obtained an order of the County Court Judge, awarding him compensation for criminal injury to his property on the preceding 7th March, to be raised off the county at large, which order was affirmed by the Judge of Assize on the 1st July, 1907, the amount of compensation being increased. In accordance with their practice under the Public Bodies Order, 1904, the County Council at a meeting on the 25th February, 1907, had considered and confirmed the estimates presented by the secretary for the financial year ending 31st March, 1908, in pursuance of which the necessary rates for that year were struck.

On the 3rd December, 1907, B. obtained a conditional order for a mandamus, directed to the County Council and their treasurer (the H. Bank), commanding the latter, out of such moneys as were under its control, or if same were insufficient, then out of the first moneys coming to its hands as treasurer, to pay to B. the amount of the decree and costs. Cause being shown, on the grounds that the Council were not empowered to pay sums awarded for criminal injuries out of the general funds of the county, levied and collected for other purposes of a public nature; that it was intended to provide for the sum awarded to B. in the estimates to be considered in February, 1908; and that to strike a special rate for the purpose at another period of the year would cause much expense and trouble:—

Held, that the conditional order should be discharged.

Sullivan v. *Giltrap* (2 New Ir. Jur. R. 212) followed, as to the inefficacy of the decree to create a liability immediately enforceable against the County Council as a debt.

Magovern v. *Finlay* (20 L. R. Ir. 189) distinguished.

The King (*Tighe*) v. *County Council of Mayo* (*ante*, p. 160) distinguished, on the ground that in the present case there was no possibility of including the amount awarded to B. in the estimates for the current financial year.

(1) Before Lord O'Brien, L.C.J., and Madden and Wright, JJ.

MOTION to make absolute a conditional order for the issuing of a writ of mandamus, directed to the Hibernian Bank, Limited, the treasurer of the County Council of the King's County, commanding that the Bank, out of such moneys as were under its control as such treasurer, or, should those moneys be insufficient, then out of the first moneys coming under its control, as such treasurer, forthwith pay to George Lovett Bennett, the prosecutor, the sum of £986 7*s.* being the amount of a decree, together with costs and expenses, awarded by the Judge of Assize, dated 1st July, 1907, whereby the appeal from the decree of the County Court Judge of the King's County, dated 29th May, 1907, ordering that the prosecutor should receive from the County Council the sum of £860, for loss and damage sustained by him by reason of his property being maliciously set on fire, was affirmed, but varied and increased by the sum of £90 sterling, together with £36 7*s.* as and for the costs and expenses, making in all the sum of £986 7*s.*, and further directed to the County Council of the King's County, commanding that the Council do forthwith strike and levy a rate for the payment of the amount of the decree.

Certain outhouses and property of the prosecutor at Grange in the King's County were destroyed by fire, on the night of the 7th March, 1907; and the prosecutor having duly, under the Local Government Act, 1898, applied for compensation, he obtained a decree from the County Court Judge for the sum of £860. The County Council appealed against the decree at the Summer Assizes, 1907, whereupon Mr. Justice Wright, the Judge of Assize, gave a decree for the larger sum of £950 compensation and £36 7*s.* costs and expenses, making together the sum of £986 7*s.*, to be levied off the county at large.

The latter decree was as follows:—

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SUMMER ASSIZES, 1907.

LOCAL GOVERNMENT (IRELAND) ACT, 1898.

By the Judges of Assize for the County of King's.

Appeal List No. 16.
County of King's.

In the Matter of an Application for Compensation for Criminal Injury to Property, and of the Local Government (Ireland) Act, 1898,

Between

Major George L. Bennett, of Grange, King's County, *Applicant;*

and

The County Council of the said County of King's, *Respondents.*

WHEREAS by an Order of the County Court Judge, dated the 29th day of May, 1907, made in this Matter, which was an application under the provisions of the Local Government (Ireland) Act, 1898, for the sum of £1159 as compensation for that on the night of the 7th day of March, or early on the following morning, on the lands of Grange, in the Parish of Leikieran, and in the County District of Birr No. 1, in the Division of Birr, in the County of King's, one waggonette and other vehicles, a quantity of harness, two dogs, 15 barrels of oats, 30 cwt. of straw, and about 10 cwt. of hay, and various other articles, as also a range of out-offices, consisting of stables, coachhouses, and harness-room, were wantonly and maliciously set on fire and burned,

IT WAS ORDERED AND DECREED that the applicant was entitled to the sum of £860 for the damages complained of, and that the said sum of £860 should be raised off the county at large of the King's County.

AND WHEREAS an appeal having been duly taken from such order to the Judge of Assize for the said county, the same came on to be heard at these present Assizes in the presence of the counsel of both parties, respectively.

IT IS ORDERED AND DECREED by the Court that the said order be (and the same is hereby) affirmed, and that the amount be increased to the sum of £950, with costs of appeal, and that the said applicant do recover from the said respondents, the County Council of the King's County, the sum of nine hundred and eighty-six pounds, seven shillings, for such compensation, costs, and expenses, the same to be raised and levied off the county at large of the King's County, and paid to the applicant by the said respondents, pursuant to the statute in that behalf.

Dated at Tullamore this 1st day of July, 1907.

Compensation, ...	£950 0 0
Costs and expenses in County Court,	12 0 0
Costs of Appeal, ...	15 0 0
Witnesses' expenses on appeal, . .	9 7 0
Total to be levied, . . .	£986 7 0

GEORGE WRIGHT, *Judge.*

GEORGE W. B. WRIGHT, *Registrar.*

ADAM MITCHELL & SON, *Solicitors.*

On the 10th July, 1907, prosecutor's solicitors sent a copy of the foregoing decree to the manager of the Hibernian Bank, Tullamore, requesting payment thereof, to which the manager replied on the 11th July, saying that there were no funds to pay the decree. The solicitors then wrote on the 12th July, inquiring what funds were to credit on the day the manager received the copy of the decree, but no reply was given. On the 17th July, 1907, the solicitors, through the sheriff of the King's County, applied to the County Council and the Hibernian Bank for payment of the amount; and on the County Council not paying, and the treasurer stating that the account of the County Council was largely overdrawn, as at that time it was, the sheriff attempted to seize certain property of the County Council; but, on its being pointed out to him that he had no power under the decree to make a seizure, he abandoned all the goods. The County Council subsequently brought an action against the sheriff for damages for wrongful seizure, and the sheriff lodged 1*s.* in Court with his appearance, which the County Council accepted in full satisfaction of their claim, and subsequently applied for their costs of the action, which motion was refused. On the 20th July, 1907, the solicitors wrote to the secretary of the County Council, asking if the Council would levy a rate for payment of the decree and pay same, and received a bare acknowledgment of their letter. A quarterly meeting of the County Council was held on the 26th August, 1907. The solicitors again wrote to the secretary, asking if a rate had been struck for the purpose of meeting the decree, to which they received a reply from the acting secretary, stating that the matter had not been before the meeting of the Council. Since the date of the decree the Hibernian Bank, who were the treasurers of the County Council, had had in their hands and under their control moneys of the County Council more than sufficient to pay the amount of the decree; and in addition to the demand made on the treasurer by the sheriff for payment of the decree, the solicitors, on the 26th October, 1907, wrote to the manager of the Bank, at Tullamore, demanding payment of the decree, to which the only reply was an acknowledgment. On the 26th November, 1907, the solicitors wrote both to the

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secretary of the County Council, and to the treasurer, demanding payment, and received a reply from the solicitors for the head office of the Bank stating that the County Council had informed the Bank that there were no funds applicable to the discharge of the decree, and as they struck rates only once a year, viz., at their quarterly meeting in February, they could not proceed to levy any rate until their February meeting. No reply was received from the secretary of the County Council.

A conditional order for a writ of mandamus having been made on the 3rd December, 1907, the County Council and the Hibernian Bank showed cause, in which the practice in relation to meeting decrees for malicious injuries was set out as follows: The financial year of the County Council ends on the 31st day of March in each year. The quarterly meeting of the County Council, at which the estimate of sums to be raised to meet the estimated liabilities and expenses of the Council is considered and discussed, is held on the 25th February in each year. In pursuance of this consideration and discussion the necessary rates are struck at the ensuing quarterly meeting held on the 25th day of May, in each year. In cases of sums awarded for criminal injuries the Council include the same in their estimate, provided decrees have been obtained during the immediately preceding year.

It was submitted that the Council were not empowered to pay sums awarded by way of compensation for criminal injuries out of the general funds of the county, levied and collected for such purposes as the upkeep and maintenance of workhouses, lunatic asylums, and county infirmary, and for the maintenance of public works and roads, repairs and rents of court-houses, and other similar purposes; and that the decree in the case of the award of compensation for criminal injury merely found that the applicant was entitled to a certain sum as compensation, and that the sum was to be levied off a certain area, and ordered that the applicant should recover the sum from the respondents, and that the respondents should raise the sum off the area named. It was further submitted that no order of mandamus should be issued against the Council unless they refused to raise a sum so awarded, which they had not. The Council were always willing and intended to provide for the amount awarded in the estimates

which would be considered by them at their meeting on the 25th February, and the rate for same would be struck at the quarterly meeting on May 25. It was further submitted that if the County Council had to pay out of the general county funds sums so awarded, it would lead to great practical inconvenience, and if the Council had to strike a special rate at any period of the year, it would entail large expense and trouble.

Fetherstonhaugh, *K.C.*, and *Denning*, for the prosecutor:—

The affirmance of the Judge of Assize is a payment ordered within the meaning of sect. 80 of the Local Government Act, 1898, and the treasurer of the Council should "pay the same out of moneys under his control as such treasurer, and, if those are insufficient, out of the first moneys coming under his control as treasurer." The point in controversy is ruled by *The King* (*Tighe*) v. *Mayo County Council* (1). There the Court was dealing with an "excluded charge" coming within sect. 57 of the Local Government Act, 1898; here the Court is dealing with an "excluded charge" within sect. 56 of the same Act. The Legislature deals with the two classes of excluded charges embraced in the two sections in identical language.

Ignatius J. O'Brien, *K. C.*, and *W. G. Gibson*, for the Hibernian Bank:—

The duties of the County Court Judge and Judge of Assize with reference to compensation for criminal injuries are the same as the duties of the Presentment Sessions of the Grand Jury: section 5 of the Local Government Act, 1898. The old procedure has been adopted in its entirety in the Local Government Act: sect. 5 (2), sect. 5 (4), sect. 5 (7). The form of decree under the Rule of Court regulating this procedure bears out this contention: see forms 10, 11, and 12 in the schedule to the Rules of March 22, 1899. This contention is also borne out by the adaptation of sects. 106 and 135 of the Grand Jury Act, 1836. Procedure was contained in sect. 138 of the Grand Jury Act, 1836, and sect. 4 of the Grand Jury Act, 1856. *The Mayo Case* (1) has no application,

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as it dealt with an excluded charge under sect. 57 of the Local Government Act, 1898. In the case of a baronial guarantee, the amount that may be required during the year may be estimated, as the area is certain and the liability is certain. In the case of compensation for criminal injuries there is no liability until the decree is made. The area is not certain until that decree is made, nor is the amount certain until that time. [They referred to the Public Bodies Order, 1904, Articles 2 (*f*), 5, 16, 44, 67, 69, and the forms referred to therein; also to *Magovern* v. *Finlay* (1), and *Sullivan* v. *Giltrap* (2).]

Ronan, K.C., and *W. J. Johnston*, for the County Council:—

The Mayo Case (3) has no application, as the Court was dealing with a charge the liability and area in respect of which had already been fixed. The case of *Sullivan* v. *Giltrap* (2) is nearer the present case than *The Mayo Case* (3), and the Court is bound to follow it.

Denning, in reply.

Feb. 3.

LORD O'BRIEN, L.C.J.:—

The question raised by this case is an important one. That question is this—The prosecutor, Mr. George Lovett Bennett, obtained a decree from the County Court Judge of the King's County in respect of malicious injury, and the County Court Judge, who made the decree, ordered the sum awarded, £860, to be levied and raised off the county at large of the King's County. This decree was appealed from, but was confirmed by my brother Wright, as Judge of Assize. My brother Wright's decree, which increased the amount of the award by £90 to £950, was in the usual form. It ran thus:—"It is ordered and decreed by the Court that the order of the County Court Judge be affirmed, and that the amount be increased to the sum of £950, with costs of appeal, and that the applicant do recover from the respondents, the County Council of the King's County, the sum of £986 7*s*.

(1) 20 L. R. Ir. 189. (2) 2 New Ir. Jur. Rep. 212. (3) *Ante*, p. 160.

for such compensation, costs, and expenses, the same to be raised and levied off the county at large of the King's County, and paid to the applicant by the said respondents, pursuant to the statute in that behalf." This is the decree that Mr. Bennett got. I have been careful to set it out in full. The essential character of that decree, for the reasons I will afterwards assign, is, in my opinion, conclusive of this case. Having got this decree, Mr. Bennett applied to the County Council, or their treasurer, to pay it forthwith out of the general funds of the county—out of the county funds. The County Council, through their treasurer, say the money decreed to be paid has not yet been raised, and that accordingly there is no appropriate fund to pay it. Mr. Bennett replies that he is not concerned with that, that he has got his decree, that as between him and the County Council there is an unconditional order to pay, that the County Council can afterwards, if they wish, take the necessary steps, by raising the sum out of the specified area, to recoup themselves: and, in order to justify his contention, relies upon the decision of the Court of Appeal in *The Mayo Case* (1), in which Lord Justice FitzGibbon pronounced the unanimous judgment of the Court. That case, so far from being a conclusive decision in favour of the applicant, Mr. Bennett, appears to me, when the reasons upon which it was founded are considered, an authority against, rather than in favour of, the applicant. The two main reasons upon which that judgment was founded were—first, that there was in that case a certain specified guaranteeing area, and, secondly, that an estimate of the amount for which that area might be liable was capable of being approximately ascertained. In *The Mayo Case* (1) the area was ascertained, and the making of an estimate was practicable. But in the case of malicious injuries, how could there be any prospective ascertainment of the area of charge? Who could forecast whether there would be any malicious injury at all? What estimate could possibly be made of the amount for which compensation should be granted? Who could possibly forecast whether a malicious injury would take place, in what part of the county it might take place, what would be the extent of injury, and the

(1) *Ante*, p. 160.

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proper amount of compensation, and the chargeable area? All these cardinal factors would be wanting.

But what about *Sullivan* v. *Giltrap* (1) ? The Court of Appeal did not intend for a moment to derogate in any way from their own unanimous decision in *Sullivan* v. *Giltrap* (1). The question in that case was not, of course, precisely the same as in the case before us, but it appears to me that the principle of the decision governs this case. The precise question in that case was whether a garnishee order could be made in respect of an amount awarded as compensation for malicious injury, and the Court unanimously held that there was no existing debt by the County Council which could be attached. There the money had not been reduced into the possession of the County Council and earmarked as an amount due to the judgment debtor. The Court held that the amount awarded was not, until raised, a debt directly payable, but that the appropriate remedy for the enforcement of such a decree as we have before us, was by mandamus to compel the County Council to raise the amount. Every word Lord Justice FitzGibbon said in *Sullivan* v. *Giltrap* (1) has a direct bearing on this case, but I will read only a portion of his judgment :—

"Mr. Boyd has contended that a change has taken place in that matter by the operation of the Local Government Act, and that County Councils are now made directly liable, and so directly liable as to be debtors and liable to pay, and to pay at once, from their own moneys, wholly irrespective of their duty to levy. Assuming for a moment that there is a more direct liability than there was before, it does not do Mr. Boyd any good unless it shows that the relation is wholly changed, and that County Councils have become, in the case of moneys awarded for those injuries, in the relation of debtors, and that the money is payable directly and at once under the order of a Court. The form of decree is that the person has recovered a sum of money to be levied off a particular district. *The duty is enforceable, not as by recovery of a debt, but by mandamus.*"

The Lord Chancellor said he concurred in Lord Justice Fitz-Gibbon's judgment; and Lord Justice Holmes delivered a short

(1) 2 New Ir. Jur. Rep. 212.

judgment to the same effect as Lord Justice Fitz Gibbon's. I think—if I may with deference say so—that the judgment of the Court of Appeal in *Sullivan* v. *Giltrap* (1) was conspicuously right, and it appears to me to conclude this case. I asked Mr. Denning during the course of his excellent argument whether he had any case, supposing the decree made was to this effect—that the applicant should get from the specified delinquent area so much money, and that the County Council was the hand to raise it, and when raised to pay it over to the person who was to be compensated? He said—or rather I should say seemed to me to admit—that if the decree made had this effect, he had no case. What else is the decree before us? It does not, in my opinion, create a debt *eo instanti* enforceable between the County Council and the person in whose favour it is made. It does not impose on the County Council an immediate liability to pay, but it casts without doubt upon the County Council a duty to raise, levy, and pay—a duty enforceable by mandamus. This is quite plain from the language of the adapted enactments and from the forms to which Mr. O'Brien and Mr. Ronan in their clear argument referred. The County Council was first to levy and then to pay.

Before I conclude I wish to state what I so frequently mentioned during the argument, that there appears to me a radical objection to Mr. Bennett's application. That application involves that the county funds derived from non-peccant sources should be applied to discharge the liability of a peccant, delinquent area. This should not, in my opinion, at any time or under any circumstances, however temporarily, be done, though the county funds might, or could, be afterwards recouped by a subsequent levy of the amount of compensation from the peccant, delinquent area. *The Mayo Case* (2) was different. There was in that case no question of crime. In the case of criminal injury, crime has been committed. A peccant area has to be ascertained after the crime has been committed. The amount awarded to the individual who may suffer is at once compensatory and punitive, and it seems to me wholly unjust and without any sanction of law to make the general body of the county funds liable in the first instance, even tempo-

(1) 2 New Ir. Jur. Rep. 212. (2) *Ante*, p. 160.

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rarily, for such a charge. When the area of charge is ascertained, whether it be the whole county or some specific part, it must bear the burden which the County Court Judge, or the Judge of Assize, says it shall bear; and payment of the sum awarded, if there is any unreasonable delay in raising it, can be enforced by mandamus. That is the appropriate and adequate remedy. We must discharge the conditional order.

MADDEN, J.:—

The case presented on behalf of the applicant rests on the 80th section of the Local Government Act of 1898, sub-section 1 of which enacts: "Where the payment of a sum by any County or District Council, or by the treasurer of such Council, or other officers of the Council on behalf of the Council, is ordered by a Judge of Assize, under this or any other Act, or is required, either to comply with any enactment or to meet either a judgment or a decree of any competent Court, or an order for the payment or collection of any money made by the Lord Lieutenant in pursuance of any Act, the treasurer of the Council shall pay same out of moneys under his control as such treasurer, and, if those are insufficient, out of the first moneys coming under his control as treasurer, and such payment may, to the extent of any such moneys, be enforced against such treasurer in like manner as it might be enforced against the Council." The decree in the present case is an order made by the Judge of Assize, but that is purely accidental, and in the course of the argument it was not seriously argued that there could be, under section 80 of this Act, any difference between the decree of a County Court Judge and (in the event of an appeal), a decree or order of a Judge of Assize. Therefore the provisions of the 80th section applicable to the present case are, not those relating to a decree of a Judge of Assize, but those which come into operation when a sum of money is required to meet a judgment or decree of any competent Court. The question then arises, when is money required to meet the decree of a County Court Judge, or of a Judge of Assize on appeal, awarding compensation for a criminal injury? The jurisdiction of the County Court in such a case is created by section 5 of the Act of 1898,

which transfers to the County Court the business of the Presentment Sessions and the Grand Jury in relation to compensation for criminal injuries. The jurisdiction transferred is the familiar jurisdiction exercised under the old Grand Jury Act, in the first instance, at Presentment Sessions. The presentment then made came before the Grand Jury, and might be the subject of traverse before the Judge of Assize. The proceeding was not a judicial one, and it resulted, not in the creation of a debt, but in the award of compensation, which was to be levied and paid to the applicant off a certain area. The Local Government Act substitutes for the old machinery of Presentment Sessions, Grand Jury, and fiat by the Judge of Assize, a procedure which is judicial from beginning to end, but the result is the same. It is not the creation of a debt, but a decree declaring the applicant entitled to a certain sum for compensation, which compensation is directed to be levied off a particular area. My Lord has referred to the case of *Sullivan* v. *Giltrap* (1), which states this proposition in very clear language. The case of *Magovern* v. *Finlay* (2) decided that the relationship of debtor and creditor is established when the payment order for the amount awarded, signed by the secretary to the Grand Jury, is placed in the hands of the person declared entitled to compensation. I turn to the 80th section, and I put out of consideration the portion referring to an order made by a Judge of Assize. The section proceeds: "or is required, either to comply with any enactment or to meet either a judgment or decree of any competent Court." The question is, when is the money "required"? The money is required, according to *Magovern* v. *Finlay* (2), when the payment order signed by the secretary is placed in the hands of the person entitled to compensation, for then, and not till then, is there a debt to be paid.

The decision of the Court of Appeal in *The Mayo Presentment Case* (3) has been relied on as laying down a general principle which is applicable to, and governs, the present case. I have therefore examined it in some detail. The question decided in *The Mayo Presentment Case* (3), so far as that case relates to that

(1) 2 New Ir. Jur. Rep. 212. (2) 20 L. R. Ir. 189. (3) *Ante*, p. 160.

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now before us, mainly depended on the section of the Local Government Act of 1900, which provides that, notwithstanding the 67th section of the principal Act (the statute of 1898), the County Council might, either immediately prior to or at the beginning of each financial year, make one poor-rate for the whole financial year, and collect the same in equal moieties, one moiety for each half-year. For the purpose of striking this annual rate the clerk of each District Council is required by the Local Government Board Order of December the 17th, 1904, to submit one estimate of the liabilities and requirements of the District Council during the next ensuing financial year. The secretary of the County Council is also to submit an estimate of the liabilities and requirements of his Council, and the County Council is required by article 68 to consider these estimates, and afterwards to assess the poor-rate, as a result of their consideration of the estimates of the expenditure for which they had to provide.

Under the Tramways Act, 1883, the amount required to make good the baronial guarantee was levied by means of the county cess. The machinery provided was the delivery to the secretary of the Grand Jury of a certificate showing the deficiency in the receipts of the tramway chargeable against the barony. This certificate was to be laid before the Grand Jury at the next Assizes, who were bound to present the certified sum to be levied under the provisions of the Grand Jury Act. The words "when received by him," on which such stress was laid in the argument before us, occur in a provision which is to take effect in the event of the Grand Jury failing to present. Under this system, in the words of Fitz Gibbon, L.J., "the presentment became compulsory at the next Assizes after the delivery of the certificate, and the payment became compulsory as soon as the money was levied."

The contention of the County Council of Mayo, which was adopted by the Court of Appeal, was that the changes consequent on the abolition of the Grand Jury, the transfer of the baronial charge from the county cess to the poor-rate, the system established by the Local Government Act, 1898, and the provision for one annual poor-rate under the Local Government

Act, 1900, had so altered the time and the manner of assessing and levying the money required for baronial guarantees as to make it the duty of the Council to estimate the amount in advance, and to include it in the poor-rate, so as to raise it, and have it in hands, to meet the certificates which might come in during the year for which the poor-rate is struck.

It is plain that the Court of Appeal, in adopting this contention, founded their judgment upon the possibility of estimating in advance, sufficiently for the purpose of the annual budget, the liability incurred by a guaranteeing barony; and, although the judgment deals only with baronial guarantees, I think the principle of the decision includes, and ought by us to be applied to, any liability capable of being so estimated. In the case of a guarantee under the Tramways Act there is a continuing liability, under a statutory charge, upon a fixed area. The amount of certified deficiency no doubt may vary; but a provision for variations of the kind is a frequent element in estimates of the kind, and is indeed implied in the use of the word.

The liability to levy compensation for criminal injuries could not possibly be made the subject of a prospective estimate, for none of the necessary materials would be forthcoming. This is apparent from the nature of the thing, and the conclusion is fortified by Mr. O'Brien's elaborate examination of the prescribed forms upon which the estimate of the County Council is based. The event may never occur which gives rise to the liability. The nature of the injury, the amount of compensation, the area from which it is to be levied, are all undetermined until after the happening of the event and the decree of the Judge. In my opinion the foundation of the judgment of the Court of Appeal—the possibility of prospective estimate—is absent from the present case; and the decision therefore has no application.

WRIGHT, J.:—

I concur. The main question to be considered is the nature and effect of a decree for compensation for criminal injuries. Section 5 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), transfers to the County Court the business of the Presentment Sessions and Grand Jury in relation to compensation

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for criminal injuries under, among other statutes, sects. 135 to 140 of the old Grand Jury Act (6 & 7 Wm. 4, c. 116). Under that section the County Court is empowered to make a decree against the County Council from which an appeal is given to the Judge of Assize; the appeal is made expressly subject to the County Courts (Ireland) Acts, 1851 to 1889, and the Judge of Assize may vary the decree in respect of the area off which the compensation is to be levied, as well as in respect of other matters; the amount of the compensation awarded by the decree, whether of the County Court Judge or the Judge of Assize, may by the decree be directed to be levied off the county at large, or such county or other district, parish, townland, or sub-denomination thereof as the Court shall direct (sect. 135 of the old Grand Jury Act (6 & 7 Wm. 4, c. 116)).

It is therefore not merely a decree ascertaining the amount to be paid to the successful applicant by the County Council; it also finds and specifies the area off which the sum awarded is to be levied. This is the essential difference between a decree of this kind and the ordinary civil-bill decree; and this essential distinction is clearly brought out by a comparison of the form of an ordinary civil-bill decree and a decree for compensation for criminal injury. In the former, the Court orders and decrees that the plaintiff do recover from the defendant a specified sum, "and the several sheriffs of the respective counties in Ireland are commanded to take in execution the goods of the defendant to satisfy the debt"; in the latter, the decree recites that the Court has found (1) the amount of compensation to which the applicant is entitled, and (2) the area off which it is to be raised; and thereupon the Court orders that the applicant do recover that amount from the County Council, and that the said sum be raised by the County Council off the specified area.

The effect of a decree of this kind has been considered in two reported cases. In *Magovern* v. *Finlay* (1) it was decided that the amount of a presentment obtained by a judgment debtor was attachable by garnishee order under the state of facts proved in that case, namely, where a cheque in favour of the judgment

(1) 20 L. R. Ir. 189.

debtor for the amount presented had been drawn by the treasurer with whom the money was lodged, on the ground that the debtor was equitably entitled to the amount of the cheque in the hands of the treasurer, and that the relation of debtor and creditor was established between the treasurer and the judgment debtor. In the later case of *Sullivan* v. *Giltrap* (1) a garnishee order to attach the amount of such a presentment *simpliciter*, i.e., without any special facts, such as existed in the case of *Magovern* v. *Finlay* (2), was discharged by the Court of Appeal, on the ground that the making of such a decree does not create a debt payable immediately, or constitute the relation of creditor and debtor between the plaintiff in the decree and the County Council; and, while the decision in the case did not go beyond this, the Court plainly indicated, as the necessary result of the nature of the decree, that it only gives the plaintiff a right, which he can enforce by mandamus, to compel the County Council to raise the amount off the specified area.

The County Council submit that they are not empowered to pay sums awarded by way of compensation for criminal injuries out of the general funds of the county applicable to general purposes, and that the amount of this decree and other decrees of a like character will be provided for in the annual estimates to be considered by them at their meeting on the 25th of the present month for the purpose of making a rate for the whole of the coming financial year; and in support of this contention we have been referred to the Public Bodies Order, 1904. It is the duty of the secretary of the County Council, early in February of each year, to prepare an estimate of what in his opinion will be required during the ensuing financial year to provide for the liabilities and requirements of the Council, and the sums to be supplied to the public bodies whom the County Council is bound to supply with money (article 67).

Later on in the same month (February) the County Council holds a meeting to consider the general estimate of rates, and the estimates of rates for separate charges (article 68). By article 44 the secretary is required to keep the Register of Separate Charges (Form 17), in which shall be recorded full particulars of such

(1) 2 New Ir. Jur. Rep. 212. (2) 20 L. R. Ir. 189.

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separate charges as shall from time to time be leviable upon the county or any portion of it, and shall be payable directly by the County Council; section 56 (1) and (2) of the Local Government (Ireland) Act, 1898, enacts that the amount required to meet any charge in connexion with compensation for criminal injuries should be separately estimated and raised by means of the poor-rate, but as a separate item of it. The Form referred to (Form 17) headed "Register of Separate Charges" must state the name of the person entitled to receive the amount of the separate charge; the decree creating the liability; if in respect of a criminal injury, the nature of the injury; the district liable, &c.; in its whole framework clearly pointing to a decree already made, area ascertained as well as duration of the charge—implying that the amount must be raised before payment can be looked for. If the argument for the prosecutor be correct, these forms are entirely unsuitable. But in truth it is a misuse of language to speak of this liability for compensation for criminal injuries as being one properly, or even by possibility, the subject of an estimate.

The idea of the secretary to the County Council, prior to the commencement of the financial year, attempting to estimate in advance the number and the magnitude of the criminal injuries likely to be perpetrated and to form the subject of application for compensation, the amount to be awarded in the coming year, and over what areas, so as to arrive at a figure to cover this head of county expenditure, is simply to attempt the impossible.

Accordingly I am of opinion, that there is no immediate liability until the money has been raised by the county from the area charged, and that section 80 of the Local Government Act of 1898 does not apply; no payment is "required," to cite the language of the section, to meet an order of a competent Court at present, or until the money is raised by the county. For these reasons, founded on the true nature of the decree, and acting on the decision of the Court of Appeal in *Sullivan* v. *Giltrap* (1), I would come to the conclusion, if there were nothing more in the case, that this application fails. We have, however, been told that, by

(1) 2 New Ir. Jur. Rep. 212.

a recent decision of the Court of Appeal, *The King* v. *Mayo County Council* (1), reversing the decision of this Court, reported in 41 Irish Law Times Reports, p. 214, the point now contended for by the applicant has been ruled in his favour. I am bound by that decision, and my only duty is to follow it, and apply it where it is properly applicable. The subject-matter of that decision was a liability arising under a baronial guarantee given under the Tramways (Ireland) Act, 1883; and the decision of the Court of Appeal in effect held that a rate was good, which, in addition to raising an amount sufficient to meet the amount certified by the arbitrators for the year in question under sections 6 and 7 of the Tramways Act of 1883, also included sums properly payable, but which had not been paid, by the guaranteeing area in previous years, and which had in fact been paid by the whole county. It is no business of mine to defend, still less to attack, that decision. I content myself with saying that it has no application to a decree for compensation for criminal injuries.

I am of opinion that a decree against a County Council, limited in its terms, as this is, to payment out of funds raised from a specified area, ought not and cannot properly be paid out of the general funds of the Council. On every ground the present motion fails, and must be refused.

Solicitors for the prosecutor: *A. Mitchell & Son.*
Solicitors for the County Council: *Egan & Conway.*
Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*

J. L.

(1) *Ante*, p. 160.

Appeal.
1907.
Nov. 14, 15, 18.
Dec. 6.

M'CULLOUGH *v.* MUNN (1).

Libel—Evidence—Lost document—Photograph of libellous letter—New trial directed after verdict for plaintiff—Verdict for defendant at second trial—New trial refused—Appeal from both orders.

In an action for libel, contained in a letter alleged to have been written by the defendant, accusing the plaintiff of immorality with the wife of a third person, the defendant traversed writing the letter. The original letter was lost, but a photograph had been taken of it, and the envelope in which it was enclosed had been preserved. On the first day of the trial the plaintiff's counsel used the photograph in his speech to the jury, and the jury were allowed to see and examine it. The Court then adjourned. On the following day it transpired that the original letter was lost, and the Judge ruled that though the photograph was evidence of the contents of the letter, it could not be used for comparison of handwriting with the genuine letters of the defendant. The trial resulted in a verdict for the plaintiff, with £50 damages. The Divisional Court set aside the verdict, and directed a new trial. At the second trial the plaintiff's counsel did not offer the photograph in evidence, but they put in evidence, without objection, a "plain copy" of the libel, which did not show certain peculiarities appearing on the photograph, and relied upon the envelope, the evidence of two witnesses who had seen the letter before it was lost, and who were acquainted with the defendant's handwriting, and the use by the defendant of certain words and phrases in letters written by him, and proved to be genuine, similar to the words in the alleged libel. This trial resulted in a verdict for the defendant. The Divisional Court refused the plaintiff's motion to set aside the verdict, and for a new trial, and the plaintiff appealed from both orders of the Divisional Court:—

Held, by the Court of Appeal—(1) that it was not competent for the plaintiff to appeal against the earlier order, as he had adopted and acted on it.

Held, (2) by the Lord Chancellor and Holmes, L.J., that the verdict of the jury at the second trial must be considered by itself, and was not such a verdict that no reasonable jury could arrive at.

Held, by FitzGibbon, L.J., that the second trial was a mis-trial, and the plaintiff was entitled to a new trial on payment of the costs of the second trial, of the new trial motion, and of the appeal.

The use and admissibility of photographs as evidence of written documents considered.

(1) Before The Lord Chancellor, and FitzGibbon and Holmes, L.JJ.

THIS was an action for libel founded on an anonymous letter dated 21st July, 1905, alleged to have been written by the defendant, David Munn, to Hans Moore, imputing immorality between the plaintiff, David M'Cullough, and Moore's wife. The words of the libel are too gross for publication. The action had been tried twice. It was tried first before the Chief Baron and a special jury at Belfast, at the Spring Assizes of 1906. The original libel had been lost before the trial came on; but the envelope bearing the post mark of 21st July, 1905, was preserved. A photograph had been taken of the letter before its loss; and counsel for the plaintiff used this photograph in his opening statement to the jury on Saturday, the 31st March, when the trial commenced; and the jury were allowed to see and examine it, and compare it with the envelope and other writings before it transpired that the original was lost. On the morning of Monday the 2nd April, the loss of the original libel appeared, and Palles, C.B., ruled that though the photograph was evidence of the contents of the letter, it could not be used for comparison of handwriting with the genuine letters of the defendant. The defendant denied that he had written the letter. The trial resulted in a verdict for the plaintiff with £50 damages.

On the 11th June, 1906, the King's Bench Division set aside the verdict, and directed a new trial (1).

The action was tried a second time by Gibson, J., and a special jury at the Summer Assizes at Belfast, in 1906. At the second trial the plaintiff's counsel did not offer the photograph in evidence for any purpose; but they put in evidence

(1) The following judgments were delivered:—

WRIGHT, J.:—

This case has been fully argued, and I regret that the Court is not unanimous in its decision. For my part, I have formed a clear conclusion.

This is an action for libel, and the alleged libel is contained in a letter of the 21st July, 1905, to a Mr. Moore. The defendant denies the authorship of this letter. It happened that the plaintiff's solicitor had in his possession photographs of this libellous letter, which he had caused to be taken for the purposes of the case. The case was tried before the Lord Chief Baron and a special jury at the Belfast Spring Assizes. The case was opened on a Saturday.

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a plain copy of the libel, which was not proved to be a compared copy, or a facsimile copy; and the plaintiff relied on the envelope containing the original libel; on the evidence of two witnesses who had seen the letter before it was lost, and who were acquainted with the defendant's handwriting; the use by the defendant of word and phrases in letters written by him, and proved to be genuine, the same as words and phrases occurring in the letter; and upon reference in the letter to private matters not generally known, but of which the defendant had exceptional opportunities of knowledge.

While the case was being opened there were handed up to the jury two photographs, one of the alleged libel, and one of a genuine letter of the defendant's. This was on the Saturday. On the Monday it was discovered that the original letter had been lost.

The Lord Chief Baron ruled—and I am clearly of opinion that he was right—that, upon the loss of the original letter, the photograph was admissible to prove the contents of the letter, but that the photograph could not be used for purposes of comparison with the genuine documents.

I have only to refer to section 30 of the Common Law Procedure Act, 1856, re-enacted in section 8 of the statute 28 & 29 Vict. c. 18: "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

Now, I am of opinion that the genuine letter of the 10th July could not be compared with this photograph. I do not think a photograph is anything more than a copy. The photograph is not, for purposes of comparison, equivalent to an original.

Now as regards the other evidence, as to whether this letter was in the handwriting of the defendant, I am satisfied that there was ample evidence upon which a jury might have found for the plaintiff. For the purposes of comparison they had the envelope of the libellous letter. However, I cannot disregard the last paragraph of the report of the Lord Chief Baron. I cannot say that a substantial wrong has not been done, and, accordingly, I am of opinion that there must be a new trial of this action.

BOYD, J.:—

I am of opinion that there is no ground for interfering with the verdict which has been found. The motion is based on two grounds—(1) that the verdict is against the weight of evidence, and (2) upon the improper admission of evidence. I think it sufficient to base my opinion on our Rule.

The trial resulted in a verdict for the defendant; but the jury added an expression of sympathy with the plaintiff and the Moores, and a recommendation that the defendant should forego costs.

The plaintiff moved for a new trial; but on the 21st November, 1906, the King's Bench Division, Andrews and Kenny, JJ. (*dissentiente* Boyd, J.), refused the application. The plaintiff appealed both from the order of the 11th June, 1906, setting aside the verdict and directing a new trial, and from the order of the 21st November, 1906, refusing a new trial.

No injustice has been done. When, in the course of the trial, it was found that the original letter was missing, the Chief Baron ruled that the photograph was admissible to prove the contents of the letter, but was not admissible for purposes of comparison of handwriting.

There was evidence in abundance by independent witnesses on which the jury could find as they did without reference to the handwriting of this letter, and the jury were warned to discard the photograph, and were directed that they could not use it at all for purposes of comparison.

The wording of Order XXXIX., Rule 7, is clear; and assuming that the photograph was not admissible for the purpose of comparison, I am clear that no substantial wrong or miscarriage has been occasioned by what occurred at the trial, and I think that the verdict should stand.

MADDEN, J.:—

A serious doubt has arisen as to the application of sect. 30 of the Common Law Procedure Act, 1856. My own opinion is, however, clear, that upon the language of the section the word "letter" includes both the paper and the words. The paper as well as the words and symbols are all included in the word properly understood. A photograph is nothing more than a copy. I refer to Best on Evidence, at page 426.

The copy which was produced at the trial was not "the disputed writing." I need not repeat what has been said by my brother Wright. Now, as regards Order XXXIX., Rule 7, I am not prepared to say that in this case any substantial wrong has been done; but I am clear that there has been a miscarriage. The jury had this document before them during the afternoon, and were doubtless comparing the handwriting. I may say, the greater the similarity the greater the danger.

Serjeant Dodd made a remark of great force in the course of the argument, when he said he was unable at the trial to test these documents without admitting them. Perhaps there was not a wrong, but there was a miscarriage, and the verdict must be set aside, and the action go to a new trial.

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John Gordon, K.C., James Chambers, K.C., and *W. M. Whitaker, K.C.*, for the appellant:—

We contend that the plaintiff is entitled to appeal against the order of the 11th June, 1906, directing a new trial, and he also appeals against the order of the 21st November, 1906, refusing a new trial. Neither party to an issue directed by the Court of Chancery is precluded by going to trial from afterwards appealing against the order by which it was directed: *Masterman* v. *Price* (1); *White* v. *Lisle* (2); *Butlin* v. *Masters* (3). When the jury had not all the materials before them in the shape of evidence which might have enabled them to arrive at a right conclusion, the verdict should be set aside. The photograph was not produced at the second trial. Section 30 of the Common Law Procedure Act, 1856, does not apply to the case: that only deals with documents that are not relevant to the issue. At common law a jury can compare all handwritings, if they are relevant to the issue. Photographs are now admitted as evidence in many cases. In *Lucas* v. *Williams* (4) a photograph of an engraving of a picture sold by the defendants was held to be evidence of the picture. A new trial ought not to be granted on the ground that the verdict of the jury was against the weight of evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not possibly find: *The Metropolitan Railway Company* v. *Wright* (5). As the whole of the evidence was not before the jury on the second trial, unless a new trial is granted, there would be a miscarriage of justice.

Ronan, K.C., W. M. M'Grath, K.C., and *Stronge*, for the respondent:—

It is not competent for the plaintiff to appeal from the order of the 11th June, 1906. Once judgment was pronounced, setting aside the verdict, and directing a new trial, and the plaintiff brought the action to a new trial, it is not open to him to appeal from the order: *Browne* v. *M'Clintock* (6). A party

(1) 1 Chas. Coop. 358.
(2) *Ibid.* 361, note.
(3) 2 Ph. 290.
(4) [1892] 2 Q. B. 113.
(5) 11 A. C. 152.
(6) L. R. 6 H. L. 456.

cannot ask a Court of law to rescind an order on which it has acted, even in cases where there is no authority to make the order: *Tinkler* v. *Hilder* (1); *Talbot* v. *Odlum & Best* (2); *Philpot* v. *Page* (3). But there is no case to be found in which a plaintiff went to a second trial, and then, when beaten, tried to impeach the order setting aside the verdict obtained on the first trial: Lush's Practice, p. 441. The cases decided on trial of an issue directed by a Judge of a Court of Equity do not apply. It is a matter of discretion with a Judge of a Court of Equity who has directed an issue whether he will accept the finding or not: *Butlin* v. *Masters* (4). The difference between the trial of issues in Chancery and a trial at law is stated in *O'Connor* v. *Malone* (5).

The sole question then is—was the verdict at the second trial perverse, or so wholly against the weight of evidence that no reasonable men could have arrived at such a conclusion? *The Metropolitan Railway Company* v. *Wright* (6); *Cox* v. *English, Scottish, and Australian Bank* (7).

THE LORD CHANCELLOR:—

Dec. 6.

This is an action of libel founded upon an anonymous letter alleged to have been written by the defendant to Hans Moore, imputing immorality between the plaintiff and Moore's wife.

It was tried before the Lord Chief Baron and a special jury of Belfast at the Spring Assizes of 1906, and resulted in a verdict for the plaintiff for £50. The original letter had been lost before the trial came on; but the envelope bearing the post-mark of 21st July was preserved. A photograph of it, however, had been taken; and counsel for the plaintiff used this photograph in his opening statement; and the jury were allowed to see and examine it, and compare it with the envelope and other writings, before it transpired that the original was lost. This occurred in the evening; but the loss appearing next morning, the Chief Baron ruled that, though the photograph was evidence of the contents of the letter, it could not be used for comparison of handwriting with the genuine letters of

(1) 4 Ex. 187.
(2) I. R. 5 C. L. 302.
(3) 4 B. & C. 160.
(4) 2 Ph. 290.
(5) 6 Cl. & Fin. 572, 584.
(6) 11 A. C. 152.
(7) [1905] A. C. 168.

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the defendant, and that the 30th section of the Common Law Procedure Act of 1856 did not apply, as it was not the disputed writing.

There was a motion to set aside the verdict, and the Chief Baron reported in effect that he could not say that the jury might not have been misled by an unauthorized use of the photograph, and for that reason declined to approve of the verdict; and the King's Bench Division by order dated 11th June, 1906, set aside the verdict and directed a new trial.

The first question is, whether the plaintiff is at liberty, having regard to what has happened, to appeal from the order of the 11th June, 1906, and contend, as he has done, that we should now hold that this verdict for £50 was right and should be restored? The plaintiff did not appeal from the order of 11th June, 1906, but, on the contrary, acquiesced in it, and served notice of trial for the next assizes at Belfast, and proceeded to trial before a special jury there on 25th July, 1906, with the result unfortunately for him that on the evidence presented by him to this jury a verdict was found for the defendant, and judgment was entered for the defendant, the possibility or propriety of the setting aside of which judgment is the second question in the case. The King's Bench Division, by its order of 21st November, 1906, has refused a motion to set aside the second trial; and the plaintiff on the 11th June, 1907, has served notice of appeal from both orders.

I am of opinion on the first point that the plaintiff cannot be heard to question the order of 11th June, 1906, directing a new trial. He acquiesced in it, and took his chance of obtaining a verdict from another jury. This is a question not only of fair play to the adversary, but of procedure and practice in our Common Law Courts; and it is admitted that no authority can be produced from any decision of a Common Law Court warranting it, though facts raising such a question must have occurred over and over again during a long series of years.

Numerous instances might be put to show the injustice which would result to a defendant. The plaintiff might change the venue before the second trial, and it would be quite possible in some particular venue that the jury would disagree on the second trial, and the case be tried a third time, or the plaintiff might be dis-

appointed and get only a farthing or, say, £10. It is suggested that all this only leads to the imposition of proper terms as a condition of restoring the first verdict. I think the difficulties in the plaintiff's way are not removed by the imposition of terms. The order of 11th June, 1906, was equivalent to a direction that if the plaintiff desired to proceed with the litigation he should do so by trying the case again; and he has adopted that order, taking the benefit of his chance under it of, perhaps, getting larger damages. All analogy is against the allowance of such an attempt now tried for the first time. The case of a party who receives costs under an order of a Court wrongly made and even made without jurisdiction is one instance: *Tinkler* v. *Hilder* (1); so is the decision that a party cannot apply for a new trial after a motion in arrest of judgment: *Philpot* v. *Page* (2).

The authorities cited from the Equity Courts in the case of issues directed in Chancery are rather an affirmance of the view that it would be otherwise in a Court of Law, as the decisions are carefully rested on the ground that issues directed in Chancery stand on a peculiar ground. During the argument in *O'Connor* v. *Malone* (3) counsel referred to 2 Maddock, Ch. Practice, p. 481—"The Chancellor may go further in directing a new trial than the Courts of Law can; for if a verdict is not against the evidence, a Court of law cannot grant a new trial, but a Court of Equity will, in order to have justice done, for the verdict must be such as will satisfy the conscience of the Court," and Lord Cottenham is careful to point out (p. 591) that the Court of Chancery "grants or refuses a new trial without regard to those rules which guide a Court of Law upon this subject." Upon this first question, therefore, I have no difficulty in holding that we must treat the order of the 11th June, 1906, as binding upon the plaintiff for all purposes.

We have thus to deal with the second trial, which took place before Mr. Justice Gibson and a special jury of Belfast at the summer Assizes of 1906. The plaintiff's counsel, being determined to avoid the difficulty which arose at the first trial, did not offer the photograph in evidence for any purpose. They put in (the defendant's counsel not objecting) a plain copy of the libel not proved

(1) 4 Ex. 187. (2) 4 B. & C. 160. (3) 6 Cl. & Fin. at p. 584.

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to be a compared copy, and from which are absent many of the characteristics of the defendant's writing which the original might have presented, or the photographs if used for comparison of handwriting might have presented. The Judge appears to have had before him a typed copy—a facsimile from the photograph—in which the characteristics in that photograph appeared prominently. The plaintiff, however, proved the envelope in which the libel was sent, and produced for comparison with it genuine letters of the defendant; and they examined two witnesses who had seen the libel before its loss, and expressed an opinion, from their knowledge of the defendant's writing and its characteristics which they pointed out, that the libel was written by the defendant. It was also pointed out that local matters were referred to, which the defendant was especially and almost solely acquainted with, and expressions used which the defendant had used in reference to Mrs. Moore. This formed a strong body of evidence, and plaintiff's counsel elected to rest their case on it. The defendant on the other hand swore positively that he did not write or know of the letter. He denied knowledge of some of the local matters referred to in the libel, and he examined one witness who expressed an opinion from his knowledge of defendant's writing that the letter was not his. The plaintiff would have been justified in putting in the photograph as evidence of the contents of the libel, and apparently it was the only legal evidence by way of copy of its contents; and I think they might also, on the authority of the decision in *Brookes* v. *Tichborne* (1), have used it for the purpose of calling attention to peculiarities of spelling and use of capital letters and punctuation; but they deliberately elected for greater safety to exclude the photograph. The jury found a verdict for the defendant; and if the second trial had been the only one, I cannot see how it could be suggested that we could interfere with it.

The tack put by the jury to their verdict is, I think, quite consistent with its being founded on more than one reason; and they show a doubt about the innocence of the defendant. Judge Gibson would have preferred a verdict for the plaintiff, and I confess that a verdict for him would have been more in

(1) 5 Ex. 929.

accordance with my view of the evidence; but that does not warrant us in setting it aside.

Then, if the first trial is out of the case, the *onus* lies on the plaintiff to establish to the satisfaction of a jury that the defendant wrote the letter; and I think the only logical result is, that we must deal with the second trial upon its own materials, and cannot, by importing into it what occurred on the first trial, endeavour to obtain indirectly the setting aside of the first trial. The failure to obtain a verdict is, or may be, attributable to the mode in which the plaintiff tried the case and elected to furnish evidence; but that is no reason for giving a new trial against his adversary, who has in fair fight obtained a verdict.

I look on the imposition of terms, however strong, as another mode of indirectly setting aside a verdict otherwise impregnable. Judges often feel in refusing to set aside a verdict which a jury gives that they are parties to an action which may work out a result less satisfactory than their own ideas would suggest; but that does not warrant us in interfering with the verdict which a jury arrived at, when it cannot be alleged that it was either perverse or unreasonable in the sense in which such words are interpreted, and of which the learned Judge refused to stay the execution.

I think the appeal must be dismissed; but I desire to add that I express no opinion as to how far a photograph may be used in evidence, beyond what I have already stated to be clearly its legitimate use.

FITZ GIBBON, L.J.:—

The judgment of my colleagues ends this action, and when I consider the conditions on which alone a third trial could be granted, I feel that it may be merciful thus to close the chapter of the plaintiff's misfortunes. But this involves a confession of inability to rectify error, and on fair terms to allow the case to be tried according to law, which I cannot bring myself to make.

As to the second trial, I base my judgment on the report of Gibson, J., which shows that the proceeding before him was a mis-trial; with great force he points out the consequences to

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the law of evidence of accepting the assumption on which it proceeded, or approving the manner in which it was conducted. Read with the judgments of the King's Bench, with which he was not furnished, his report makes the course of the second trial as inexplicable as was the loss of the original libel, which was the prime cause of wrecking the plaintiff's case.

Gibson, J., reports:—

> "The trial was conducted on the assumption that the photograph could not be used *for any purpose whatever.*"

At the first trial, the Chief Baron admitted the photograph; and he never questioned its being good secondary evidence of the libel, upon proof of the loss of the original. In the King's Bench, Wright, J., says:—

> "The Lord Chief Baron ruled—and I am clearly of opinion that he was right—that, upon the loss of the original letter, the photograph was admissible to prove the contents of the letter, but that it could not be used for purposes of comparison with the genuine documents."

Madden, J., says:—

> "I need not repeat what has been said by my brother Wright."

Boyd, J., says:—

> "The Chief Baron ruled that the photograph was admissible to prove the contents of the letter."

Therefore, the second trial was conducted on an assumption absolutely contrary to the judgments of the Lord Chief Baron, and of all the Judges in the King's Bench.

The report further shows that, on the vital matter of the proof of the libel, the second trial was a game of cross purposes. The original having been lost, and the photograph being assumed to be inadmissible for any purpose, the plaintiff first tried to prove the libel by calling for the copy which the defendant's solicitor had taken upon inspection of the original. Its production was refused by the defendant's counsel, whereupon the jury was supplied with what Gibson, J., describes as "an ordinary plain copy"; while the Judge was given "a typed copy of each separate

page of the libel, with special spelling, use of capitals, &c., preserved." We have seen both these documents. The "typed copy" was manifestly torn out of a brief; being a copy of a copy it was not lawfully admissible. The "plain copy" handed to the jury was read and marked as evidence without objection. It was not a true copy at all. It was not proved to be such, and it does not correspond either with the "typed copy" or with the photograph. It shows few, if any, of the peculiarities appearing on them. Its admission without objection is explicable by the fact that any objection would necessarily have led either to a non-suit, or to proof and admission of the photograph as the only true copy in existence. The actual result is stated by Gibson, J. Being unable to use the photograph either for proof or for cross-examination, the plaintiff was placed at a grievous disadvantage; the original libel not being forthcoming, and the photograph being inadmissible, the jury could not use their own eyesight—the best of all tests. The most important portions of the oral testimony consisted of pointing out peculiarities of spelling and writing; the size and shape of the paper, which was suggested to be a cut down leaf of the defendant's note paper, was also most material. These topics mainly occupied the counsel and the Judge. In addressing the jury the counsel had seen the photograph, and possibly had it before them: the Judge had the "typed copy"; and the jury had nothing but the "plain copy," which showed none of the peculiarities which it was their duty to consider, and upon which the witnesses, counsel, and Judge were addressing them.

What is the law? The Common Law Procedure Act has nothing to do with the case. It merely provided that genuine writings might be put in evidence for comparison with "a disputed writing." The Chief Baron ruled nothing more than that a photograph, admissible as secondary evidence, was not "a disputed writing" with which "genuine writings" could be compared under the statute. But, before comparison was authorized by statute, *Brookes* v. *Tichborne* (1) decided that other writings are admissible to prove a *peculiar mode of spelling a word.* Parke, B., says:—

(1) 5 Ex. 929.

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"that this might be evidenced by the plaintiff having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters—the more frequently the greater the value of the evidence. For that purpose one or more specimens written by him with that peculiar orthography would be admissible. . . . If a habit of the plaintiff so to spell a word" (which must include any other notable or visible peculiarity) "was proved, it was some evidence against the plaintiff to show that he wrote the libel. That proposition cannot be disputed; the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions on which the plaintiff had used it."

In Taylor on Evidence the law is stated thus:—

S. 550: "Another general rule which governs the production of secondary evidence, whether of documents or of oral testimony, is that the law recognizes *no degrees* in the various kinds of such evidence. If, therefore, a deed is lost, or be in the hands of the adversary, who, after due notice, refuses to produce it, the party seeking to give evidence of its contents may at once have recourse to parol testimony, though it be proved that he has in his possession a counterpart, a copy, or an abstract of the documents.

S. 551: "This rule, of course, does not mean that the mere memory of a witness who has read a deed is entitled to equal weight with an authenticated copy of the same instrument; for in many cases a jury would properly regard such evidence with distrust, and if it should appear that more satisfactory proof was intentionally withheld, their distrust might amount to absolute incredulity; but the rule simply applies to the legal admissibility of the evidence.

S. 853: "The rule which includes in one legal category every species of secondary proof by no means opens a door to all sorts of evidence, however loose, which a party chooses to tender. The contents, therefore, of a written instrument which is lost cannot be proved by means of a copy, until it be shown that such copy is accurate; and if, as frequently happens, a party to the suit has himself made a copy of a letter which he has sent to his adversary, this copy, should the adversary refuse to produce the letter after notice, cannot be read in evidence, unless the party who made it can swear to its accuracy, or some other witness can be called who has compared it with the original. Neither can a document—excepting in a very few cases by statutory authority—be proved by the production of the copy of a copy, for such evidence would be rejected on the broad ground which renders hearsay evidence inadmissible. The opponent would have a right to object that, assuming the second copy to correspond exactly with the first, the first

must be produced and proved to have been compared with the original, or otherwise there would be nothing to show that the second copy and the original were included. Such evidence would, in fact, be but the shadow of a shade."

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In my opinion, the question for us is whether the plaintiff is to be conclusively bound by the second trial, where evidence was given, and which was conducted, in the way which I have described; or whether it is not possible to grant a third trial upon just terms, and to have the case legally and properly heard and decided. I admit that the plaintiff must be made responsible for the mode in which the second trial was conducted. Gibson, J., has reported that the mis-trial before him was due to the misapprehension by the plaintiff's counsel of the decision of the King's Bench. Therefore it seems to me, that the plaintiff should pay the costs of the second trial, of the new trial motion, and of this appeal, before going to a new trial. It might even be right to make him pay the costs of the first trial, so as to leave the defendant, if defeated, to pay for one trial only.

A somewhat similar fatality happened in *The Bank of Ireland* v. *Trustees of Evans' Charities* (1). On the first trial of an action between A and B, the Judge gave certain directions to which A objected; he tendered a bill of exceptions, which was afterwards argued, and a *venire de novo* was ordered, on which a new trial took place. But the party who had obtained the verdict did not appear at the second trial; and on the second trial the verdict and judgment were pronounced against him. He brought a writ of error; finding that the *postea* and all the proceedings relating to the first trial were omitted from the record, he applied to the Irish Court to have these omissions supplied. It refused, and the House of Lords held that this mode of proceeding was erroneous; it ordered the record to be amended, by entering on the roll the first trial, the exceptions, and the award of a *venire de novo*, and it allowed the appeal, upholding the first verdict.

That was the converse of the present case. But I agree that, in this case, the plaintiff cannot now appeal from the

(1) 5 H. L. Cas. 389.

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original order for a new trial, because he acquiesced in it and went without objection to the second trial. The question on which I differ from my colleagues is that of holding the plaintiff conclusively bound by the subsequent mis-trial. I hold that a new trial on just terms is possible. I have stated what those terms should be. The law recognizes photography as a mechanical means of copying. A photograph, when admissible, is good secondary evidence of the original. The tribunal which tried this case was entitled to see the photograph as secondary evidence of the lost original, and to look at it for the purpose of ascertaining the words of the libel, and the way in which those words were spelled, and the shape and size of the paper on which they were written. At the second trial the jury had no copy of the libel to look at, and the Judge had only a copy of a copy, and the only existing copy—*to wit* the photograph—was neither produced or proved.

The only miscarriage at the first trial was that the Chief Baron was not told that the original document was lost until after the photograph had been handed to the jury, and used by them for the purpose of comparison. I should have thought that this miscarriage would have been sufficiently remedied by telling the jury that they could not use the photograph for the purpose of comparison with any other document, but that they were at liberty to consider it as evidence of the contents of the lost document from which it was taken. In *Tait* v. *Beggs* (1) this Court went a great deal further in treating a miscarriage as not fatal to a verdict. We concurred with the King's Bench in holding that certain evidence had been wrongly admitted; but though the King's Bench set aside the verdict and ordered a new trial, we held that there had been no substantial miscarriage, and we sustained the verdict as being supported by sufficient evidence, and the damages as moderate in amount.

In this case no Judge has hesitated to say that he would have found for the plaintiff. On the evidence, therefore, no substantial wrong has been established. If the photograph had been produced and proved at the second trial, and if

(1) [1905] 2 I. R. 525.

Gibson, J., had told the jury, as the Chief Baron told the first jury, that they were not to use it for the purpose of comparison with any other writing, but that they might treat it as a copy of the lost libel, and use it for the purpose of ascertaining what appeared on the face of that libel, the only difference between the two trials would have been that the jury on the first trial had inadvertently made a comparison on the Saturday which the Judge on the Monday told them to discharge from their minds. In either case they could use the photograph to illustrate the oral evidence, just as they could use the envelope. On this, the matter of substance as to "miscarriage," I venture to adopt the judgment of Boyd, J., though I cannot follow him so far as to say that there was no evidence for the defendant, or that no reasonable jury could have found for the defendant.

HOLMES, L.J.:—

This action was brought to recover damages for a libel contained in an anonymous letter, addressed to and received by Hans Moore, imputing in coarse and unambiguous language to the plaintiff adulterous intercourse with Mrs. Moore. The action was tried before the Lord Chief Baron, at the Belfast Spring Assizes of 1906, and resulted in a verdict for the plaintiff, damages being assessed at the sum of £50. The only issue then raised, or that could be raised at any time with a prospect of success, by the defendant was, that he was not the writer or sender of the libellous letter; and, during the opening statement of counsel for the plaintiff, a photograph of this document was handed to the jury. It was afterwards proved to the satisfaction of the Court that the original had been lost. Secondary evidence of its contents was therefore admissible, and, as far as I can ascertain from the facts before the Court, the only legal secondary evidence in existence was the photograph taken before the loss.

Several letters proved to have been written by the defendant were given in evidence as specimens of the defendant's handwriting; nor could these letters have been rejected, inasmuch as, although the libellous document had disappeared, the envelope

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in which it was enclosed was forthcoming and the address thereon was a fit subject for comparison. I presume, however, that the plaintiff's counsel invited the jury to compare the admitted handwriting with what appeared in the photograph, and that up to a certain point this was allowed; but that the Judge, after further consideration, and during the progress of the trial, ruled that the photograph could only be looked at for the purpose of ascertaining the contents of the letter, and not for the purpose of such comparison. I have no doubt—indeed I understand it to be admitted—that he explained the distinction to the jury, and asked them to dismiss from their minds everything founded on such use of the documents as he held to be illegal.

On this basis the case proceeded and the verdict was found. It was, however, afterwards set aside by an order of the King's Bench Division, of the 11th June, 1906, on the ground that although the direction of the Judge was right in law, there was a risk that the jury were either unable or unwilling to free their minds from the impression produced on them by comparing the documents. Thereupon the plaintiff's advisers served notice of trial for the Belfast Summer Assizes of 1906, at which the case was heard by a jury before Mr. Justice Gibson, and resulted in a verdict and judgment for the defendant, which the Divisional Court, by order of the 21st November, 1906, declined to disturb, when the plaintiff applied to have them set aside. This order is now appealed from, and the notice of appeal further asks that the order for a new trial of the 11th June should be discharged.

The most important question for our decision is, whether the plaintiff having accepted and acted on the last-mentioned order by bringing the action to trial a second time, can now appeal therefrom. There is no instance to be found, either before or after the Judicature Act, of an appeal or anything analogous to an appeal in such circumstances in an action which the parties were entitled to have determined by the verdict of a jury. In the Court of Chancery issues were often sent for trial by a jury; but their verdict was only intended to assist the Judge, who was not bound to act on it, and who might come to a conclusion opposed to, or inconsistent with, it. In such cases the technical mode of getting

rid of the findings of the jury was to set aside the order directing the trial of the issues, and an application for this purpose might be made by a party who had acted on the order; but no such proceeding was ever known in the Courts of Common Law.

The plaintiff would have had, in ordinary circumstances, a year within which he could have appealed from the first order. But it cannot, I think, be denied that he might during that period have done some act that would have deprived him of the right to appeal. For example, if he had said to the defendant—"I believe I must succeed in a second trial, but I want to have no more litigation, and if you pay me £25 for the damages instead of £50, and £20 for costs, I shall go no further," would it have been possible, if this proposal had been accepted, and the £45 paid, for the plaintiff to have repaid the £45, and to serve notice of appeal three months later? I have no doubt that such a notice would have been set aside as a matter of course. But what happened in this case has placed the plaintiff in a much worse position. He took the risk of a second trial, with a chance of obtaining a verdict and larger damages than £50. The defendant was thus forced to incur much expense and trouble, and after having obtained a verdict and a judgment which I shall for the present assume cannot be impeached as long as the order under which the trial was had stands, it is argued that he is exposed to an appeal, the result of which may be to get rid not only of the order acted on by the plaintiff, but of the verdict and judgment that resulted from such action. Let me ask, if the second trial had ended in a verdict for the plaintiff with £20 damages, could he have sought to re-establish the verdict for £50 by appealing against the order for a new trial? Surely there can be but one answer to this question. And yet such an appeal cannot be logically distinguished from the appeal now attempted. I am, therefore, of opinion that no appeal lies from the order of the 11th June, 1906, and that the appeal from the order of the following November must be heard as if the second trial was the only trial of the action. If this be so, I am not at liberty to look at what had previously happened. I express, neither directly nor indirectly, personal approval of the first order, or of the grounds on which it was made. Having decided that no

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appeal lies therefrom, it is not within my jurisdiction to consider its propriety, and I confine myself to the second order, which upheld the verdict and judgment given at the trial before Mr. Justice Gibson.

On this occasion the plaintiff's counsel did not offer the photograph in evidence for any purpose, and were satisfied with proving the contents of the libellous letter by what was stated to be a copy —made I know not when or how—but to which no objection was taken. The evidence relied on by them for a verdict consisted of (1) a comparison of the address on the envelope with specimens of the defendant's writing; (2) two witnesses who had seen the letter before it was lost, and who were acquainted with the defendant's handwriting: they gave their belief that the defendant wrote the letter and stated the features of the writing that led them so to believe; (3) the use by the defendant of words and phrases the same as, or similar to, words and phrases occurring in the letter; (4) reference in the letter to private matters, not generally known, but of which the defendant had exceptional opportunities of knowledge.

The evidence given on behalf of the plaintiff on the foregoing points was met by the defendant's denial of his having written the letter, or of his having heard of it before the action was begun; by a contradiction by him and another witness of matters deposed to in the plaintiff's evidence, and by the opinion given by a witness acquainted with the defendant's handwriting, who had seen the letter, that it was not written by the defendant.

This condensed abstract of the evidence may perhaps suggest that a jury, having no opportunity of seeing the letter or a facsimile reproduction thereof, and of forming an independent judgment by comparing it with the other documents, would hesitate before finding a verdict against the oath of the defendant. A verdict for the plaintiff would be neither perverse nor unreasonable, and would have been approved of by Gibson, J., who, however, declined to stay execution, as the controversy appeared to him to be one of fact. He regretted that the jury had not an opportunity of using their own eyesight, the best of all tests; but there is no reason to hold that they did not make an honest and

intelligent use of the materials before them. Indeed, I can hardly believe that if the second had been the only trial, counsel would have had the courage to challenge the verdict.

It must be admitted that the order setting aside the first trial had a consequence which was probably not contemplated by the Court that made it. Assuming, as I am bound to do, that the photograph could not be used by the jury for comparison of handwriting, it does not follow that it might not be looked at for the purpose of observing peculiarities of spelling, punctuation, use of capitals, and similar characteristics. Mr. Justice Gibson appears to think that there is no legal objection to this being done, and I agree with him. But the grounds given for setting aside the first verdict were not a misdirection by the Judge; but that the jury having the photograph before them, there was the risk of their, consciously or unconsciously, disregarding what he told them. There would, however, be the same risk in every trial at which the photograph was given in evidence; and when the plaintiff was advised to go to trial again, counsel were obliged to withhold the photograph altogether. Indeed, if the photograph was the only copy taken of the letter before its loss, it was in the power of the defendant to make a second trial practically impossible. He could have objected to any copy being given in evidence except the photograph; and when it was produced, there would have been the same grounds for setting aside the verdict for the plaintiff as had existed after the first trial. These difficulties arose from the order of June, that now binds this Court, and from the plaintiff having elected to accept it; but they afford no reason for setting aside a verdict otherwise unimpeachable.

There is, however, one matter mentioned in the Judge's report which, if unexplained, would cause me to hesitate before upholding the verdict: it is the jury's expression of sympathy with the plaintiff and the Moores, followed by a recommendation that the defendant would forego all costs. This might indicate a distrust of their own conclusion, or even that it had been the result of a compromise in the jury-room. But it can be accounted for by the defendant's allegation that the action was the outcome of a conspiracy on the part of the Moores and the plaintiff—a charge for which there was no foundation; and it tends to show that their

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verdict was given with some reluctance, in obedience to a sense of duty. For these reasons I hold that the appeal must be dismissed.

Solicitor for the plaintiff: *Joseph Macaulay.*

Solicitors for the defendant: *Moorehead & Wood.*

R. D. M.

K. B. Div. 1908.

Jan. 15, 16. Feb. 10.

LARKIN, Appellant; BELFAST HARBOUR COMMISSIONERS, Respondents (1).

Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 2—"*Peaceful picketing*"—*Meaning of words "at or near"—Right to enter on private property—Onus of proof—By-law prohibiting an act without permission in writing—Onus of proving absence of permission*—40 & 41 *Vict. c.* 56, *s.* 78.

The Trade Disputes Act, 1906, in legalizing "peaceful picketing" does not confer a right to enter upon private property against the will of the owner.

The Belfast Harbour Commissioners had made a by-law, under their statutory powers, prohibiting persons from addressing a crowd on any quay, &c., the property of the Commissioners, without permission in writing from the secretary. L., without such permission, addressed a crowd of workmen on a quay, the property of the respondents, advising the workmen who were on strike to go back to work. L. was prosecuted by the Commissioners under the by-law. No direct evidence was given on behalf of the Commissioners that the permission of the secretary had not been obtained; but it was proved that L. had been warned previously against addressing meetings on the quay, and evidence was given of a statement by L. at the time of the alleged offence, that he knew that what he was doing was a violation of the by-laws. L. having been convicted of an offence against the by-law:—

Held, that the by-law in question was not repealed by sect. 2 of the Trade Disputes Act, 1906 (2), and that the conviction was right.

Held, also, that there was evidence to show that the permission in writing of the secretary had not been given.

Held, also, *per* Wright and Dodd, JJ., that the onus did not lie on the Commissioners to show that such permission had not been given.

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(1) Before Lord O'Brien, L.C.J., and Madden, Wright, and Dodd, JJ.

(2) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), section 2:—

"(1) It shall be lawful for one or more persons, acting on their own behalf, or on behalf of a trade union, or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides, or works, or carries on

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions District of Belfast on the 9th July, 1907, the appellant was charged on summons on the complaint of the respondents with having, without permission in writing from the secretary of the respondents, addressed a crowd or assembly of persons at Dufferin Dock, on a quay, pier, or other place, the property of the respondents, contrary to the respondents' by-laws.

The evidence given at the hearing of the summons was set out in the case as follows:—

"On the hearing of the said complaint, it was proved on the part of the complainants that the said Dufferin Dock was portion of the quays, roadways, and property of the complainants, and we refer to a map showing the boundary of said property; and that for regulating the use of the quays, roadways, and property of the Harbour of Belfast certain by-laws had been duly promulgated in pursuance of the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, and that in contravention of No. 23 thereof, which reads as follows:—'No person shall, without permission in writing from the secretary, preach, read aloud, lecture, address any crowd or assembly of persons, sing, or perform on any musical instrument, nor shall any person commit any nuisance or indecently expose the person within any shed or on any quay, pier, or other property of the Commissioners'; the defendant had, on the 19th June, 1907, addressed a crowd numbering at least 150. On behalf of the complainants, Andrew Austin, a constable of the Harbour Police, was examined, and proved that he was on duty in plain clothes at Dufferin Dock on 19th June, 1907. At 9.40 a.m. on that date he observed a crowd, numbering at least 150. He saw the defendant, and that he appeared to be standing on a slight elevation, apparently a stool. He was addressing the crowd, making a speech to them. The constable went and spoke

business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

"(2) Section 7 of the Conspiracy and Protection of Property Act, 1875, is hereby repealed, from 'attending at or near' to the end of the section."

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to defendant, and told him that what he was doing was a breach of the Harbour by-laws. He said he knew it was, that he was going to do no harm. He continued to address the men. The defendant said he knew the constable was a Harbour Constable. The constable had got instructions from his superior officer. On cross-examination by Mr. Joseph Donnelly, solicitor, who appeared on behalf of the defendant, the witness said . . . 'He (appellant) was advising the men to go back to their work. A strike had occurred at that part of the quay known as Dufferin Dock, and he went down and was advising the men to go back to their work, as far as I could hear. I knew Mr. Larkin was an organizer of the men's Union.' The next witness examined was John A. Johnston, who stated that he was the head of the Harbour Police. He produced the original by-laws, and deposed that the by-laws were posted up in the Dufferin Dock in several places. He knew Mr. Larkin, and had a conversation with him on the subject of addressing meetings in the Harbour property on the 6th May. He warned the defendant against doing so."

It was contended on behalf of the appellant (amongst other matters) that it lay on the prosecution to prove the averment in the summons that the defendant had not permission in writing from the secretary, and it was, in addition, argued that sect. 2, sub-sect. 1, of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), gave the defendant a right to attend at or near a place where a person works if he so attended for the purpose of peaceably persuading any person to work.

The Justices being of opinion, as a matter of law, that the Trade Disputes Act, 1906, did not give rise to a defence under the circumstances of the case, inasmuch as the Dufferin Dock and the approaches thereto were the private property of the respondents, and open to the public only for certain purposes set out in their Acts, found that, as no evidence was given that permission in writing or otherwise had been obtained, the appellant had contravened the by-law aforesaid, and that the offence had been proved, and they convicted and fined the appellant, but on his requisition stated the present case, requiring the judgment of the Court as to whether they were correct in point of law in their determination.

M'Gonigal (with him *Moriarty, K.C.*), for the appellant:—

The by-law relied on is over-ridden by section 2 of the Trade Disputes Act, 1906. That section amounts to a statutory license to enter upon premises for the purposes mentioned in the section. The words are "to attend at or near the house or place," &c. This involves a right to enter the premises. A summons to attend "at the Four Courts" does not mean that the person summoned is to wait outside. The object of the appellant being to persuade the men to return to work, the case comes within the section. The by-law is made under the authority of section 83 of 10 & 11 Vict. c. 27; and section 103 of that Act expressly provides that nothing in the Act is to exempt from the provisions of any subsequent general statute. Even in the absence of such an express provision, a by-law contrary or repugnant to the laws or statutes of the realm is void: Hardcastle on Statutes (4th ed.), p. 270.

The onus lay on the complainants to prove that the permission of the secretary had not been obtained: *R.* v. *Rogers* (1); *Van Boven's Case* (2); *Carroll* v. *Eivers* (3); Molloy's Justice of the Peace, p. 234. Such permission is not in the nature of an exception, making what would otherwise be a wrongful act innocent. This is not a summons for trespass, but for an offence created by the by-law. The offence is not the addressing a crowd, which is an innocent act, but the addressing a crowd without the permission of the secretary. The absence of such permission is an essential part of the offence, and must therefore be proved by the complainants.

Gordon, K.C., and *Hanna*, for the respondents:—

The quay is the private property of the respondents, subject only to the rights of persons shipping and unshipping goods and passengers: 10 & 11 Vict. c. 27, s. 33; 10 & 11 Vict. c. lii., ss. 5, 9, and 10. Subject to these rights, the respondents can exercise the ordinary rights incident to ownership: *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (4), *per* Lindley, L.J., at pp. 250, 251. The statutory power given

(1) 2 Camp. 654.
(2) 9 Q. B. 669.
(3) I. R. 7 C. L. 226.
(4) [1892] 3 Ch. 242.

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to the respondents to make by-laws is merely a power to regulate the general management of their property. This right will not be affected by a subsequent general statute, unless the terms of such statute are clear and unambiguous. A statute encroaching on private rights of property must be construed strictly: Maxwell on Statutes (4th ed.), p. 427; *Attorney-General* v. *Horner* (1); *per* Brett, M.R., at p. 257. A general statute does not repeal a special statute unless the intention is clear: Maxwell on Statutes (4th ed.), pp. 263, 264; *Fitzgerald* v. *Champneys* (2); *Thorpe* v. *Adams* (3). The object of section 2 of the Trade Disputes Act, 1906, was merely to amend section 7 of the Conspiracy and Protection of Property Act, 1875. It does not give a right to trespass on the property of the employer. A power to attend at a place does not give a right to enter on the premises: *Wingate* v. *Foster* (4); *Difiori* v. *Adams* (5). In the definition of the word "at" in Johnson's Dictionary the illustration is used—"a man is *at* the house before he is in it."

The onus was on the appellant to show that he had the permission in writing of the secretary: *The King* (*Sheahan*) v. *Justices of Cork* (6); *Roberts* v. *Humphreys* (7); *The Queen* v. *The Justices of County Dublin* (8); 40 & 41 Vict. c. 56, s. 78. Even assuming that the onus was on the respondents to show that the act was done without the permission of the secretary, they have discharged such onus. The statement by the appellant to the constable that he knew he was violating the by-laws is an admission by him that he was there without the permission of the secretary.

Moriarty, K.C., in reply:—

The object of section 2 of the Act of 1906 was to permit persons to go to the place where the workmen are employed. In the case of extensive premises, if there was not power to enter, the object of the statute would be defeated. If a right to enter the premises is not conferred, the section is inoperative;

(1) 14 Q. B. D. 245.
(2) 2 J. & H. 54.
(3) L. R. 6 C. P. 125.
(4) 3 Q. B. D. 582.
(5) 53 L. J. (N. S.) Q. B. 437.
(6) [1907] 2 I. R. 5.
(7) L. R. 8 Q. B. 483.
(8) 8 L. R. Ir. 274.

it makes nothing lawful which was not lawful before. It was never an offence to attend *outside* a house or place for the purpose of peacefully obtaining or communicating information, or of peacefully persuading a person to work or abstain from working. Section 7 of the Conspiracy and Protection of Property Act, 1875, made watching or besetting a place an offence only when done with a view to *compel* a person to abstain from doing or to do any act which he had a legal right to do or abstain from doing, *wrongfully and without legal authority.*

Cur. adv. vult.

Feb. 10.

LORD O'BRIEN, L.C.J.:—

The controversy which this case raises for our determination is a very important, though a very narrow, one. It is no more or less than this—What does the word "at" in the 2nd section of the Trade Disputes Act of 1906 mean? Does the word "at" in that section include the word "in"? The words "at" and "in" are often used convertibly in common parlance, but what we have to determine is the precise signification of the word "at" in the statute to which I have referred. Now let me read the relevant section. It runs thus: "It shall be lawful for one or more persons, acting on their own behalf, or on behalf of a trade union or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides, or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

This is the section, and when it is read it manifests at once the importance of the controversy before us. Do the words, "to attend at or near a house or place where a person resides or works," authorize a person of the specified class, that is to say one or more persons acting on their own behalf, or on behalf of a trade union, or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend not only in the immediate proximity of a house or place where a person resides or works, but in—within—the house or place itself? Does, in

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fact, the Act of Parliament authorize an entry into a house or place, against the will of the owner, for the purpose mentioned in the clause of the section which I have read? If this be so, the Legislature has indeed conferred on the specified class a right which I think neither trade unions nor anyone connected with them has ever before claimed—a right to invade the privacy of a man's house, or the factory or place of business where a man's work is carried on.

It is only necessary to state the character of the right contended for by counsel to indicate the supreme importance of the question we have to determine. I think, however, there is not much difficulty in its determination. The Trade Disputes Act of 1906, and the Conspiracy and Protection of Property Act of 1875, must be read together, or rather the latter Act must be read as amended by the former. The 7th section of the Conspiracy and Protection of Property Act of 1875 was partially repealed by the Trade Disputes Act; and section 7 of the Conspiracy and Protection of Property Act is to be read as if the 2nd section of the Trade Disputes Act was embodied in it. That this is so, there can be no question; and this being so, all difficulty is, in my opinion, at an end. The Conspiracy and Protection of Property Act provides, amongst other things, in its 7th section, that any person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority . . . watches or besets a house or other place where such other person resides, or works, or carries on business in, or happens to be, should on conviction therefor be liable to punishment.

But it was also expressly provided that attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, in order merely to obtain or communicate information, should not be deemed a watching or besetting within the meaning of the 7th section. Watching and besetting plainly means an external operation—something not within a house or place, but without it. And the provision in the 7th section that attending at or near a place for the purpose mentioned shall not be deemed "watching or besetting,"

is plainly a limitation on those words, and points to a locality in immediate proximity to a house or place, but not within it. They relate to besetting and watching, which, as I said, plainly imply an external operation—external action. And the words in the 2nd section of the Trade Disputes Act are in like manner to be read in connexion with the words "besetting" and "watching," thus indicating what may be lawfully done without, but not within, a house or place. It was not intended to enlarge the field of operations—the physical area of the operations of representatives of trades unions or of others. The great object of the 2nd section of the Trade Disputes Act was to define what should *not* be considered intimidation, namely peacefully acquiring information, or the peacefully communicating with workmen, or endeavouring peacefully to persuade them. In fact, the intention of Parliament was to define what was before a subject of acute controversy, namely, peaceful picketing, and to take what they considered peaceful picketing out of the category of intimidation. It was never intended to authorize as a matter of right an invasion into a man's house, or entry against the will of the owner into a place of business, no matter how busy that place might be, or in any way to repeal or modify the by-laws of the Belfast Harbour Commissioners, which, made pursuant to power conferred by statute, clearly defined what should be considered an unauthorized intrusion into their property; and of this intrusion the defendant, even on his own admission, was guilty.

As to the onus of proving that the Commissioners had not given permission to the defendant to enter their premises, I own I had during the argument some difficulty as to this. However, I think there was some evidence before the magistrates to show that this permission was not given. The decision of the magistrates must be affirmed.

MADDEN, J.:—

The Trade Disputes Act of 1906 is the outcome of a long series of statutes and judicial decisions consequent on the passing of 5 Geo. 4, c. 95. By this Act all the prior statutes relating to combinations of workmen, or of masters, for the purpose of raising

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or lowering the rate of wages, or altering the hours or quantity of work, or regulating the manner of carrying on business, commencing in the reign of Edward 1, were entirely swept away. The growth and development of the combinations known as trades unions date from the passing of this statute. As these combinations were developed, the principles on which they were founded, and the methods which they employed, gave rise to difficulties which had, in the end, to be determined by the Legislature. How far such combinations ought to be regarded as illegal, as being in restraint of trade; the circumstances under which they should be held to violate the criminal law in regard to conspiracy or intimidation; how far the methods which they employed amounted, at common law, to a nuisance, indictable if of a public character, and capable of being restrained by injunction if constituting a private wrong; all these questions gave rise to litigation, and ultimately to legislation.

The method with which the present case is conversant is that popularly known as "picketing." It is part of the machinery of a strike, and consists in placing a "picket," which may consist of a single individual, at or near the place where workmen are employed, for the purpose of communicating with them on the subject of the strike.

It is important to distinguish between the act of "picketing" taken by itself, and the purpose for which it is intended. The Legislature, in the statutes to which I shall refer, has dealt with three separate kinds of picketing, distinguished by the object in view in each case. It may be resorted to (1) with a view to compel any other person "to abstain from doing or to do an act which such other person has a legal right to do or abstain from doing"; (2) "in order merely to obtain or communicate information"; or (3) "for the purpose of peaceably persuading any person to work or abstain from working." I quote, in regard to each class, the language of the Legislature.

The method of operation is in all cases "attending at or near the house or place of business where a person resides, or works, or carries on business, or happens to be." The word "picketing" does not appear in any statute, the more accurate expression "watch or beset" being used to describe the kind of "picketing"

—a more general term—in contemplation of the Legislature. It is important to bear in mind the legal considerations applicable to the act of watching and besetting taken by itself, apart from the motive, peaceable or otherwise, by which it is prompted. If the act of watching or besetting is carried out with such a degree of molestation as to amount to a nuisance at common law, the motive is immaterial, and the nuisance could be restrained by injunction, or made the subject of indictment, according as it was of a public or a private character. This was clearly established by the decision of the Court of Appeal in England, in *Lyons* v. *Wilkins* (1). Two questions arose in that case, first, whether the watching and besetting amounted to an offence under sect. 7 of the Conspiracy and Protection of Property Act, 1875, and secondly, whether it amounted to a nuisance at common law, inasmuch as it interfered with the ordinary comfort of human existence, and the ordinary enjoyment of the house beset. Lindley, M.R., was of opinion that the persistent besetting of a house with relays of men would support an action on the case for a nuisance at common law. Chitty, L.J., observes that "every annoyance is not a nuisance; the annoyance must be of serious character, and of such a degree as to interfere with the ordinary comforts of life" (p. 271); and Vaughan Williams, L.J., says "at the common law watching and besetting, apart from the law of conspiracy, might or might not be so conducted as to amoumt to a nuisance" (p. 273). In such an action as that suggested by Lindley, M.R., or in an action for an injunction, the character of the motive with which the nuisance was created would constitute no defence.

The clause under consideration in the case before us is the outcome of a long-continued struggle on the part of the trade unions to induce the Legislature to legalize watching and besetting, even when constituting a nuisance, when carried out with the motive and for the purpose of peaceful persuasion. The course of this struggle can be traced in decisions, statutes, and reports of commissions, ranging over many years.

The dangers arising from trade combination as a possible cause of molestation were realized from the time at which they were rendered

(1) [1899] 1 Ch. 255.

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lawful. The Act 5 Geo. 4, c. 95, was shortly afterwards replaced by 6 Geo. 4, c. 129, which provides a summary remedy in cases of molestation or obstruction. Afterwards, in order to remove doubts which had arisen as to the meaning of the words "molestation" and "obstruction," it was enacted, by 22 Vict. c. 34, that no person "by reason merely of his endeavouring peaceably and in a reasonable manner, and without threats or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages, or the altered hours of labour," agreed to by him and others, should be deemed to have been guilty of "molestation" or "obstruction." This statute, which recognized to a certain extent the position of the peaceful picketer, was repealed by the Criminal Law Amendment Act of 1871, passed along with the Trade Unions Act of the same year. The legislation of 1871 was in its turn replaced by the Conspiracy and Protection of Property Act of 1875, which was the governing statute until the passing of the Act of 1906.

The 7th section of the Act of 1875 provided, or rather continued in operation, a summary procedure by which watching or besetting could be punished, if carried into effect with the first of the three classes of purposes which I have enumerated, that is to say, with a view to compel any other persons to abstain from doing or to do any act which such other persons had a legal right to do or abstain from doing.

Picketing of this class was always regarded as an offence against the criminal law, punishable on indictment. This subject is fully dealt with by Bramwell, B., in his charge reported in *Reg.* v. *Druit and Others* (*The Cabinet Makers' Case*) (1); by Cleasby, B., in *Reg.* v. *Hibbert and Others* (2); and in the charge of the Recorder of London, Mr. Russell Gurney, to the Grand Jury in the same case, described by Lindley, M.R., in his judgment in *Lyons* v. *Wilkins* (3) (at p. 268) as "a masterly statement of the law as it stood in April, 1875," that is to say, before the passing of the Act of that year.

By a paragraph in the same section of the Act of 1875, the Legislature dealt with the second kind of watching or besetting to

(1) 10 Cox, C. C. 592. (2) 13 Cox, C. C. 82. (3) [1899] 1 Ch. 255.

which I have referred, in these words, "attending at or near the house or place where a person resides or works, carries on business or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." It will be observed that watching or besetting, for the purpose of obtaining or communicating information, is not by these words rendered lawful for all purposes; as, for example, in its relation to the law of nuisance; but only for the purposes of the section in which this provision occurs. This portion of the 7th section is repealed by the 2nd section of the Act, 1906, which is framed in a different and more comprehensive manner.

The statute of 1906 enacts "it shall be lawful for one or more persons, acting on their own behalf, or on behalf of a trade union, or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides, or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

The effect of this section, read in the light of the antecedent legislation is, in my opinion, perfectly clear. It legalized for the first time, by positive enactment, a course of action which might otherwise, if carried out in a certain manner, have amounted to a nuisance at common law, provided such course of action is resorted to merely for effecting certain specified peaceful purposes. To this extent only does the Act affect the enjoyment of private property. "Watching" might be so carried out as not to involve a nuisance, but the word "beset" almost necessarily connotes an interference with the common law right of the owner of the house or business premises beset, to the enjoyment of his property. Nearly all the instances of the use of the word collected in Dr. Murray's New English Dictionary involve some idea of hostility or offensive action. But this action is always from without. The idea of trespass in or upon private property is wholly absent from that of picketing, peaceful or otherwise.

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The foregoing review of the course of judicial decision and legislation shows that the interference with private right attributed to "picketing," and which was, under certain circumstances, legalized by the Act of 1906, was something done, not "in or upon," but "at or near," a house or place of business. It sounded in nuisance, not in trespass. The marginal note is not part of the Act; but by using the popular phrase "peaceful picketing" it fairly indicates what the Legislature had effected. It had ended a long-continued contest by declaring "picketing" to be lawful, when resorted to for certain peaceful purposes. Before the passing of the Act the character of the motive constituted no defence when the nature and effect of the acts done were called in question. What was legalized by the statute is an operation conducted outside, though near to, the property of the person who might be injuriously affected. The question of trespass was not before the Legislature in any shape or form. This is apparent from the antecedent course of legislation and decisions, as well as from the language of the section, which is precise and accurate in referring to acts done "at or near," not "in or upon," an adjoining house or business premises.

As regards the other questions raised in this case, I concur in the judgment which has been delivered by my Lord.

WRIGHT, J.:—

The defendant has been convicted by the Belfast magistrates for violating by-law 23 of the Belfast Harbour Commissioners, by addressing a crowd at the Dufferin Dock, the property of the Commissioners, on the 19th of June, 1907. That by-law is as follows:—[His Lordship read the by-law.]

Two questions have been argued before us, one of great importance as being of general application to disputes between employers and workmen, the other arising on the special facts of the case. The by-laws, of which by-law No. 23 forms one, were made under the Provisions of the Harbours, Docks, and Piers Act, 1847 (10 & 11 Vict. c. 27), s. 83, which gives power to harbour authorities to make by-laws, *inter alia*, for the purpose of regulating the use of harbours, docks and piers. These by-laws were made in 1888, and were posted in the Dufferin Dock,

and were admittedly validly made, and were effectual to prohibit under a penalty the offences specified in them, including the offence charged in the summons in the present case, down to the time of the passing of the Trade Disputes Act, 1906, 6 Edw. 7, c. 47. The main contention on behalf of the defendant is that section 2 of that Act authorizes the defendant to enter upon the dock or any other premises of the complainants for any of the purposes set out in the section, and has in effect repealed the by-law.

This is a question of great and general importance, now, as we have been told, for the first time coming before a Division of the High Court for decision.

By sections 1 and 2 of the Act of 1906, great and sweeping changes were made in the law as it stood since the passing of the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86; and by other sections of the Act of 1906, well-known decisions of the Courts, including the House of Lords, are got rid of, and declared to be no longer law.

The particular section with which in the present case we are concerned is section 2 (1) of the Act of 1906, taken in conjunction with section 7 of the Act of 1875. The latter portion of section 7 is repealed by the second sub-section of section 2, and for it is substituted sub-sect. 1 of section 2 of the Act of 1906. The latter sub-section allows what is popularly called "peaceful picketing," as it is termed in the marginal note, and legalizes the action of any number of persons in peacefully obtaining or communicating information, or peacefully persuading a person to work or to abstain from work, under certain specified conditions. The language and general framework of the section are obviously taken from section 7 of the Act of 1875. Counsel for the defendant contends that "at or near" in the section—words also used in the repealed portion of section 7 of the Act of 1875—are equivalent to and include "in or on," and that a person under the section has power to enter, not merely an unenclosed space like the Dufferin Dock, but which is none the less the property of the Belfast Harbour Commissioners, but any walled, roofed, and enclosed yard or workshop. This is a startling doctrine, as this extension of the law would mean a general power to invade

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private rights, and before I could decide in favour of such a contention, I would have to find absolutely clear and unambiguous language of the Legislature coercing me to such a conclusion. But the language all through of both sections, section 7 of the Act of 1875, and section 2 of the Act of 1906, points in the one direction. "Watching or besetting the house or other place," in section 7, refers to the action of some one outside, in the approach to, or neighbourhood of, such house or other place. "At or near," the same expression in both sections, as I understand the ordinary meaning of ordinary English words, denotes in the same way a person, or under the latter Act any number of persons, assembling or being in the vicinity of the house or place, as close to it as they may wish to go, but remaining outside. They may meet the workman when going to his place of work, or coming away from it, and they may succeed—and if their numbers are large they are likely to succeed more often than not—in peacefully persuading him to go to work or to strike; but the words fall short of giving power to enter the house or place. Once it was stated by counsel for the defendant that he contended, as logically he was forced to contend, that his client was under the section invested with authority to enter any labour yard or factory of an employer, the point seemed to me to be incapable of argument. Where are the words destroying private rights, and giving this general licence? I decline to give ordinary words in common daily use any other than their ordinary and well-recognized meaning, and giving them this meaning, the claim advanced by the defendant absolutely fails.

I rather suspect that counsel for the defendant was driven by the facts of the present case to put forward a claim never before advanced on behalf of workmen or their representatives.

The second objection made on behalf of the defendant is that no proof was given by the complainants that the written consent of their secretary had not been obtained. To this two answers have been given: first, that there is evidence given by the complainants, and not contradicted by the defendant, who offered no evidence that no consent in writing had been given. John A. Johnstone, head of the Harbour Police, proved that he had a conversation with the defendant on the subject of addressing meet-

ings on the harbour property in May; and Andrew Austin, a constable of the harbour police, proved that on the occasion complained of he went up to the defendant, who was addressing a crowd of at least 150 people, and spoke to him and told him that what he was doing was a violation of the harbour by-laws. Defendant replied that he knew it was. If the onus of proving a negative lies on the complainants, I hold that they have discharged it. But I do not think it does.

The by-law (No. 23), in my opinion, prohibits, under a penalty, preaching, reading aloud, lecturing, or addressing a crowd on any quay, pier, or other property of the Commissioners. That is the offence—that is what is forbidden. A written permission of the secretary of the complainants will render the act innocent. It is, in my judgment, not necessary in the summons to allege as part of the offence, nor on behalf of the complainants to prove, that a written consent of the Secretary had not been given.

On all grounds I think the decision of the magistrates was correct in law.

DODD, J.:—

The Belfast Harbour Commissioners, acting under statutory authority, have made by-laws relating to the use of the quays, roadways, and property belonging to them. Their power to make such by-laws is not disputed. The purposes for which they hold their quays and roadways are for the shipping and unshipping of goods, and the embarking and landing of passengers. To enable these purposes to be carried out without interruption, they have, among other by-laws, provided by by-law 23 as follows:—"No person shall, without permission in writing from the secretary, preach, read aloud, lecture, address any crowd or assembly of persons, sing, or perform on any musical instrument, on any quay, pier, or other property of the Commissioners."

James Larkin, on the 19th June, 1907, at 9.40 a.m., went upon the Dufferin Dock, being a quay the property of the Commissioners, and, raised on a slight elevation, made a speech to a crowd of about 150 people. The harbour constable spoke to him, and told him what he was doing was a violation of the harbour

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by-laws. He said he knew it was, and that he was going to do no harm; and it further appears that the burden of his speech was to advise the men to go back to their work. The defendant had been warned on the 6th May on the subject of addressing meetings on the harbour property.

A summons was accordingly brought, that being the sanction authorized for a breach of the by-laws, and on the 9th July, the Justices convicted the defendant, and ordered him to pay a fine of twenty shillings, and twelve and sixpence costs. The question for our decision is, Was this conviction right?

There was no justification alleged by any permission in writing. It was contended that the defendant was justified, under sect. 2, sub-sect. 1, of the Trade Disputes Act, 1906. The words of that sub-section are:—

"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of any individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides, or works, or carries on business, or happens to be, if they so attend merely for the purpose of peaceably obtaining or communicating information, or of peaceably persuading any person to work or to abstain from working."

It is conceded that the by-law is good as against all other persons, and of full validity; but it is contended that it is of no force and validity against persons who attend in contemplation or furtherance of a trade dispute for the purpose of peaceful persuasion; that the section gives a right of entry into any place where the person to be persuaded happens to be; that it could be pleaded as a statutory leave and licence to commit trespass in the case of entering upon private property; and that it overrides all by-laws of harbour commissioners, pier authorities, and municipal bodies for the regulation of traffic, and the orderly discharge of business. A man may go into a manufactory when the work of the place is going on, without permission of the owner. The notice "no admission except on business" is to read as modified by the Act. It also follows—and Mr. Moriarty did not shrink from the conclusion—that the employer of labour can enter the dwellinghouse of a workman whom he seeks to persuade; that he

can make an address to him by way of peaceful persuasion, if he go merely in contemplation or furtherance of a trade dispute. The master can attend the meetings of the men when they assemble to deliberate upon their policy or procedure, and can get other employers to accompany him thither on an errand of peaceful persuasion.

Mr. Moriarty says that it is improbable in actual fact that either master or servant would press the right, which he says is conferred, to so extreme a limit as some of the instances I suggested for his consideration during the argument would suggest. We must suppose, he says, that the parties will exercise reasonably the right conferred. But for the purpose of construing the Act we cannot make such a supposition. We must rather assume the contrary, and ascertain the extreme limits to which, on the construction we are asked to give the Act, the right could be pressed by those, on either side of a trade dispute, whose zeal is not tempered by discretion. If we can give a reasonable construction to the words without producing such an effect, we ought to do so.

It becomes necessary to ascertain with some definiteness what the law was before the Act was passed. This may be done very shortly in the words of Lord Justice Vaughan Williams:

"At common law watching and besetting, apart from the law of conspiracy, might or might not be so conducted as to amount to a nuisance. Then came the Act of 1875, which, in my opinion, is intended to define what kind of watching and besetting shall in future be warranted by law; and the definition, in my opinion, means that watching and besetting shall in future be confined to watching and besetting merely for the purpose of obtaining or communicating information."

The case from which I have taken these words is the case of *J. Lyons & Sons* v. *Wilkins* (1). It was decided in so many words in that case that "attending in order to persuade" was not within the proviso in section 7 of the Act of 1875, and was unlawful. A person who did so attend was therefore before the passing of the Act of 1906:—1. Liable to be indicted for an offence under

(1) [1899] 1 Ch. 255.

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section 7 of the Act of 1875. 2. Liable to be restrained by injunction in a Court of Chancery. 3. Liable to be sued at law for damage for nuisance.

Now the new Act declares *that* to be lawful, which the Court had decided under the old law to be unlawful. It has reference not merely to the Act of 1875, but to the general law as it then stood. But it has reference to a course of conduct, pursued or to be pursued, in relation to individuals.

If a man is indicted under the Act of 1875, he can now justify to an extent he could not justify before. If an action to restrain him be brought, he has a good answer. If he be sued for damages for nuisance, he can plead facts which will warrant the conclusion that what he did was not wrongful. It is lawful.

The clause, in my opinion, does not confer any right to commit trespass contrary to the common law, nor does it conflict with any by-law regulating the user of property in the control of a local authority. It does not purport to do so. It does not expressly do so.

I have not addressed myself to the arguments placed upon the words "at or near." Those words immediately precede the word "house," and it would be a curious method to adopt of giving a person a right to enter into private property to say "he may attend at or near it."

I by no means wish to decide what would be the effect of these words, if a person were proceeded against in any of the proceedings I have indicated for doing what was formerly unlawful, but what is now lawful, if he did it inside, instead of at or near, a house or place. It may or may not be that, for the purposes of defence in such proceedings, the mere fact of his having done what was complained of at a place on which he was a trespasser would not make him liable. It is the converse case I have to deal with. I decide that the section is not available as a justification for trespass. I do not think it justifies trespass even at or near a place where the person to be persuaded happens to be.

There remains only one minor matter that does not occur to me to be one of much difficulty. The words in the by-law are "without the permission in writing of the secretary." It

was argued that the onus lay on the complainant to negative that. A good many cases were cited as to the practice on indictments, which I think are not in point. The pleading in indictments is still regulated by very strict procedure. The law upon that is stated compendiously by Mr. Thompson in his book on the Law of Criminal Procedure in Ireland, at p. 55, which statement I adopt: "If there is any exception contained in the same clause of the statute which creates the offence, the indictment must contain negative averments showing that the case does not fall within such exception, and this is so even though the burden of proving that the case comes within the exception falls on the defendant. If, however, the exception is contained in a subsequent clause, or if in the same clause but not in the enacting part of it or incorporated therewith, it need not be negatived."

But the practitioners in the Petty Sessions Court have been freed from a good deal of trouble in respect of such matters by the Act of 40 & 41 Vict. c. 56, s. 78, already quoted. Is this within that section? In my opinion it is. The offence is really trespass. The excuse is leave and license. The by-law limits that excuse unfavourably to the accused. He cannot plead the harbour constable's verbal permission. He cannot plead that the chairman permitted him. The only excuse is a permission in writing. The matter is not new. It arises in processes for trespass in pursuit of game without the consent of the owner. Since 1877, in none of the reported cases did it appear that the prosecution had given any evidence of the absence of consent. In one case the accused sought, but sought ineffectively, to prove a consent. In the present case, even if the onus was originally on the prosecutor, the onus of proof is a thing that is constantly shifting. When the Justices had before them that the accused had been warned beforehand, and that he said on the day in question he knew he was violating the by-law, enough was proved to show that he had no licence. Enough at any rate was proved to make it incumbent upon him to produce his letter permitting him, if he had one. It is like a card of admission or a railway ticket. Every one knows he had no such letter. I prefer to say, however, that if there was

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a letter it was in the custody of the accused, and he was the proper person to produce it, and that the onus did lie upon him.

For these reasons I think the conviction was right.

Solicitor for the appellant: *Joseph Donnelly.*

Solicitor for the respondents: *Wellington Young.*

J. G. T.

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Nov. 18, 20, 28.

CORK RURAL DISTRICT COUNCIL *v.* HANNAH WALSH.

SAME *v.* JEREMIAH DESMOND (1).

Local Government—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *ss.* 132, 133—*Possession of unsound meat in slaughter-house—Preparation of carcase for human food—Exposure or conveyance for sale—Summons.*

If unsound meat, unfit for human food, is found in the slaughter-house of a butcher, being dressed and prepared for sale as human food, and is seized by the officer of the Local Sanitary Authority, condemned by a magistrate, and ordered to be destroyed, and is destroyed accordingly, the butcher is liable to a penalty, under the Public Health Act, 1878, ss. 132, 133, on the complaint of the Sanitary Authority, although it is neither alleged in the summons nor proved at Petty Sessions that such meat was being exposed or conveyed for sale.

Mallinson v. *Carr* ([1891] 1 Q. B. 48) followed.

Firth, Appellant; M'Phail, Respondent ([1905] 2 K.B. 300), distinguished.

It is immaterial that the disease could only be detected on killing the animal, and that the carcase was seized immediately upon slaughter.

CASES STATED by the Justices of County of Cork, sitting at Blarney Petty Sessions, for the opinion of the Court, as to whether they were correct in point of law in dismissing the summonses against the defendants. The summons in each case charged that the defendant "did unlawfully have in your possession a quantity of meat, to wit, a carcase of a cow intended for the food

(1) Before LORD O'BRIEN, L.C.J., and WRIGHT, J.

of man, which meat was unsound and unfit for the food of man, and was duly seized, condemned by a Justice, and ordered to be destroyed."

In Hannah Walsh's case the evidence was stated as follows:—

"At the hearing of the said complaint it was proved that the defendant was a victualler having a butcher's shop in Sunday's Well, Cork, and a slaughter-house at Blarney Road, in the County of Cork. At said slaughter-house said defendant was in the habit of slaughtering cattle, and dressing and preparing the carcases for sale. The said carcase of meat was found by Michael Ahern, complainants' sub-sanitary officer, J. F. Mahony, the complainants' veterinary surgeon, and Maurice J. O'Connell, the complainants' medical officer of health, in said slaughter-house of the defendant, which said carcase of meat was then affected with tuberculosis, was unsound and unfit for the food of man, and same was condemned by a Justice, ordered to be destroyed, and was destroyed. It was deposed to by said Michael Ahern, the complainants' sub-sanitary officer, that he saw the carcase of meat on the 16th May, 1907, at the slaughter-house of the defendant, which he brought before a Justice of the Peace to inspect, who condemned it, and ordered it to be destroyed by the defendant's butcher. The defendant was not present. It was deposed to by said J. F. Mahony, the complainants' veterinary surgeon, that he visited the slaughter-house of the defendant, that he saw the carcase referred to, that it was opened and partially skinned, and in the process of being dressed and prepared for sale, that the liver of the carcase was affected with tubercles, and that the meat was unsound and unfit for the food of man, and that the carcase had apparently been killed for about one hour or an hour and a half before he saw it. Defendant was not present. He was told by the butcher that the beast had been purchased at Midleton Fair the previous Monday from a farmer named Daniel Horgan, of Knockraha; that until killed and opened no one could ascertain if the animal was affected with tubercle. It was deposed to by Maurice J. O'Connell, the complainants' medical officer of health, that he saw the carcase referred to on the 16th May, 1907, at the slaughter-house of the defendant; that he examined same and found it was affected with tuberculosis, and was unsound and unfit for the food of man, but

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that until the liver and lungs were exposed, there was no way of ascertaining whether the carcase was affected with tuberculosis or not. It was deposed to by Daniel Barry for the defence, that he was in the employment of the defendant, who kept a butcher's shop in Sunday's Well; that the beast whose carcase had been seized had been purchased by him at Midleton Fair the previous Monday, from a Mr. Horgan, of Knockraha; that £9 10*s.* was paid for it, which was a good price for an animal of its weight; it was well nourished and looked healthy. There was no exposure for sale or any attempt to sell any portion of the carcase. That he was in the process of skinning the animal, which had only just been killed, when the sanitary officer called, and directed him to do nothing more with the animal till it should be inspected by the doctor, which directions he obeyed, and subsequently, at the request of the sanitary officer, he cut the carcase in four, and buried it. Defendant had no opportunity of seeing the beast after it had been killed, and, as a fact, did not see it. Michael Walsh, a son of the defendant, stated that he attended the Midleton Fair with said Daniel Barry, and had paid the £9 10*s.* for the cow, which was a good price having regard to her weight; she was a good, healthy-looking beast; and that no sale of meat ever took place at the place where the carcase was found."

In Jeremiah Desmond's case the evidence was to the following effect:—

"The defendant was a cattle-dealer, having a slaughter-house at Blarney Road, in the County of Cork, and was in the habit of slaughtering cattle, and dressing and preparing same for sale; that said carcase of meat was found by Michael Ahern, complainants' sub-sanitary officer, and J. F. Mahony, complainants' veterinary surgeon, in said slaughter-house of the defendant; the liver was about being removed; the carcase had been recently opened, and was in the process of being cleaned, dressed, and prepared for sale, but the internal portions had not been removed. The said J. F. Mahony swore his attention was directed to the condition of the carcase by a running abscess in the liver, as the stuff ran over the liver and along the knife of the man who was dressing the liver; that said J. F. Mahony directed the operating butcher to remove the liver, which the said J. F. Mahony examined and

took away pieces of said liver for the purpose of having same analysed. The said J. F. Mahony found that the said beast was suffering from chronic tuberculosis, and that the said meat was unsound, and unfit for the food of man, and that the said carcase had been duly seized and condemned by a Justice, and, by the directions of said Michael Ahern, was buried by the defendant. The said J. F. Mahony also swore that the person who dressed the carcase should have recognized the condition of the liver. On cross-examination on behalf of the defendant, said J. F. Mahony swore that as long as the beast was not opened and tested an ordinary dealer would not be in a position to tell by its appearance that its inside was bad. On his arrival the beast had been recently opened, the intestines not having been removed from the carcase. It was also deposed to by the said J. F. Mahony, in reply to the Bench, that an animal affected as was the one in question would be constitutionally delicate; it would not look its food or appear to be well minded. It was deposed to by Andrew O'Connor, a butcher in the employment of the defendant, that they were only in the act of opening the beast when the said J. F. Mahony came in; they had not touched the liver then, and did not think the liver was bad until said J. F. Mahony turned it up."

Desmond's case then proceeded:—

"Whereas it was contended on the part of the defendant that there should be an averment in the summons, and it should be proved, that the meat at the time it was in the defendant's possession was exposed or was being conveyed for sale, and in support of such contention the case of *Firth, Appellant*; *M'Phail, Respondent* (1), was quoted on behalf of defendant. And whereas it was contended on the part of the complainants that it was not necessary that it should be averred in the summons, or proved at the hearing, that the meat was exposed or being conveyed for sale, and that it was sufficient that it was deposited in the defendant's slaughter-house for the purpose of preparation for sale, and intended for the food of man. And whereas, upon the said hearing, we being of opinion that there should be an averment in the said summons, and that it should be proved that the meat, at the time it was in the defendant's possession, was exposed or was being conveyed for sale, and

(1) [1905] 2 K. B. 300.

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that the case of *Firth, Appellant*; *M'Phail, Respondent* (1), applied [and it not being proved to our satisfaction that defendant meant to sell the meat at all], we dismissed the case on the merits, and ordered the complainants to pay the sum of 20*s.* costs. And hereupon the judgment of the Court is required as to whether we, the said Justices, were correct in point of law in our determination as aforesaid, or as to what should be done in the premises. Given under our hands this, &c.

W. J. O'HARA, R.M.
REGINALD YOUNG, J.P."

The question for the Court was identical in both cases, save that the words in brackets did not appear in Hannah Walsh's case.

Matthew J. Bourke, K.C., and *John Linehan*, for the complainants, cited *Mallinson* v. *Carr* (2) and *Wieland* v. *Butler-Hogan* (3).

A. M. Sullivan, for the defendant, Desmond, relied on *Vinter* v. *Hind* (4).

Nov. 28.

LORD O'BRIEN, L.C.J.:—

These cases may be disposed of together—indeed they were practically disposed of during the argument. The broad question is, whether, where unsound diseased meat, unfit for the food of man, has been deposited in a slaughter-house for the purpose of sale, and has been seized by the proper officer, and has been condemned by a magistrate, the proper Authority can sue for a penalty without averring that the meat so deposited, seized, and condemned was being exposed or conveyed for sale. The contention on behalf of the defendants was, that there should be an averment in the summons, and that it should be proved that the meat, deposited where it was, was being exposed or conveyed for sale. Now this question has been already decided under the English Public Health Act, 1875, in the case of

(1) [1905] 2 K. B. 300.
(2) [1891] 1 Q. B. 48.
(3) 73 L. J., K. B. 513.
(4) 10 Q. B. D. 63.

Mallinson v. *Carr* (1) by two very distinguished Judges, Lord Brampton (then Mr. Justice Hawkins), and Mr. Justice Stephen, both of them very high authorities on the criminal law. The magistrates were led astray by the citation of a case of *Firth* v. *M'Phail* (2), which has no application to the present case. The present case, where there was a depositing of the meat in a slaughter-house, is quite different.

I would just say a word about the case of *Mallinson* v. *Carr* (1). The head-note is as follows :—"By section 116 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), power is given to any medical officer of health or inspector of nuisances to inspect meat 'exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man; and if such meat appears to be unsound or unfit for the food of man, he may seize and carry away the same, in order to have it dealt with by a Justice.' By section 117 the Justice may condemn the meat, if unsound or unfit for the food of man, and order it to be destroyed; 'and the person to whom the same belongs, or did belong at the time of exposure for sale, or *in whose possession, or on whose premises, the same was found*,' shall be liable to a penalty." I emphasize the words "in whose possession or on whose premises the same was found."

In the cases before us the meat was in the defendants' slaughter-houses.

The head-note then proceeds to state the judgment of the Court, which was that, "a person having in his possession unsound meat intended for the food of man was liable to be convicted under section 117, notwithstanding that he had not exposed the meat for sale." Lord Brampton says, at page 51 : "It appears to me that, if it was intended to deal with a man in whose possession unsound meat was found, the Legislature could not have used plainer language; and, having regard to the general objects of the Act, I should infer that the Legislature did mean exactly what it has said."

Mr. Sullivan argued the case with his well-known ingenuity, but he did not distinguish this decision; Lord Brampton goes on:

(1) [1891] 1 Q. B. 48. (2) [1905] 2 K. B. 300.

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"The words 'or in whose possession or on whose premises the same was found,' are applicable to meat which is in course of preparation for food. I can find nothing in section 117 which says that no man, even although he has unsound meat in his possession which is intended for the food of man, and although he is preparing it for sale with the intention of selling it, can be convicted unless he actually exposes it for sale. I cannot think it can have been intended that, however great a quantity of diseased or unsound meat a man has in his possession for the purpose of selling it, he should be liable to no penalty under the Act. The Legislature cannot have intended that construction. I should not have expected to find those words, 'or in whose possession or on whose premises the same was found,' in the section at all, if the true construction was that there must be an exposure for sale before there can be a conviction. Dealing only with the question asked by the Justices, I am of opinion that exposure for sale is not a necessary ingredient of the offence, and therefore the matter ought to be remitted to the Justices to deal with, as in their discretion they think fit. Our decision does not, of course, enforce upon them any obligation to convict. It was urged in the argument on behalf of the respondent that the Legislature could not have intended that a person who was ignorant of the condition of unsound meat found on his premises should be liable to conviction. It is not necessary in the present case to give any decision upon that matter. It is, however, worthy of attention that in statutes creating offences, the words 'knowingly' and 'wilfully' are frequently used, and that no such words are found in this statute." He gives no decided opinion as to whether the Legislature intended that a person who was ignorant of the condition of unsound meat, found on his premises, should be liable to a conviction. For my part I have no doubt about it, and I take the view expressed by Mr. Justice Stephen. He says (at page 52 of the report) :—"In my judgment in *Vinter* v. *Hind* (1) I am reported to have said that there must be a seizure of meat exposed for sale in order to render the person in whose possession it was seized, or whose property it was, liable to the penalty. Probably I did say so; and I think I was right, because that case turned upon

(1) 10 Q. B. D. 63.

these words, 'exposed for sale,' in section 116. This case, however, turns upon different words occurring in section 117. The offence is having in a person's possession, or on his premises, meat which is unsound and unfit for human food. There was, unquestionably, evidence in the present case that the respondent committed that offence. He was in possession of meat which was unsound and unfit for human food; and it is not an element of that offence that the meat should either have been exposed for sale or prepared for sale. Section 117 first defines the condition of things which must exist before the meat can be condemned and ordered to be destroyed, and then goes on to say 'the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession, or on whose premises, same was found, shall be liable to a penalty,' &c. I cannot agree with the argument that unless there is an exposure for sale no offence is committed. The Act does not say so. It deals with the case of a man having in his possession meat intended for human food and unfit for human food. It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession was unfit for human food, and it was said to be an unreasonable intention to impute to the Legislature. I do not think that is the proper way to interpret an Act of Parliament. The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly, without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words. The short result is that a person in possession of meat intended for human food and unfit for human food is liable to conviction; and, for my own part, I think he is liable whether he knows or does not know that the meat was unfit for human food. In answer to the question asked by the Justices, I say that it is wholly immaterial whether the meat was exposed for sale, or prepared for sale, at the time it was seized."

There is nothing in any subsequent case to derogate from that decision.

Now, what was the contention in the case before us? It is very well set forth in the case stated by the Justices—"And whereas it was contended on the part of the complainants that it was not

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necessary that it should be averred in the summons, or proved at the hearing, that the meat was exposed, or being conveyed for sale, and that it was sufficient that it was deposited in the defendant's slaughter-house for the purpose of preparation for sale, and intended for the food of man." I think that the contention was conspicuously right. Therefore, we answer the question put to us by saying that the Justices were erroneous in the ground of their decision; that the contention put forward by the complainants was right; and we remit the case to the magistrates to proceed according to law. The magistrates will be at liberty to amend the summons in any respect, if they are so advised.

WRIGHT, J., concurred.

Solicitors for the complainants: *J. C. & A. Blake.*
Solicitor for Jeremiah Desmond: *Arthur Julian.*

J. L.

K. B. Div. 1906. Nov. 27, 29, 30. Dec. 5. *Appeal.* 1907. May 3, 5, 9. June 4.

LAURENCE JOHN COOKE, AN INFANT, BY JOSEPH P. COOKE, HIS FATHER AND NEXT FRIEND, *v.* MIDLAND GREAT WESTERN RAILWAY OF IRELAND (1).

(1905. No. 13,979.)

Negligence—Railway Company—Defective fence—Turn-table—Infant trespasser—Invitation to danger.

The defendants, a Railway Company, maintained a siding and turn-table on a plot of ground adjacent to a public road which crossed their line by a bridge. The plot of ground was approached from the road by a gate, which was kept locked; and the road leading to the bridge was separated from the defendants' premises by a clay bank and thorn hedge. There was a gap in this hedge large enough for a child to pass through, and a track, more or less defined, leading to the site of the turn-table. The plaintiff, a child of tender years, obtained access to the defendants' premises, as it was alleged, through this gap, in the company of two older boys, who placed him upon the defendants'

(1) In the King's Bench Division, before PALLES, C.B., and JOHNSON and KENNY, JJ.

turn-table, and then put the turn-table in motion to give him a ride, whereupon the plaintiff's leg was severely crushed. There was evidence that, on at least one former occasion, an employee of the defendants had seen boys playing on the turn-table, who, on his approach, ran away.

In an action by the plaintiff, claiming damages for injuries sustained by the alleged negligence of the defendants:—

Held, by the Court of Appeal (Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.), reversing the decision of the majority of the King's Bench Division (Palles, C.B., and Johnson, J.; Kenny, J., dissenting), that the defective condition of the defendants' hedge was not the effective cause of the accident, and that, the plaintiff being a trespasser, and there being no evidence of invitation or allurement by the defendants, judgment should be entered for the defendants.

THIS action, which was brought to recover damages for injuries sustained by the plaintiff owing to the alleged negligence of the defendants, was tried before the Lord Chief Justice of Ireland and a special jury of the County of the City of Dublin, on the 21st June, 1906.

The plaintiff's statement of claim alleged that the defendants, negligently and in breach of duty, did not make and maintain a sufficient hedge, ditch, or other fence for separating certain lands taken for the use of the railway company adjoining the bridge at Navan from the adjoining land, in consequence whereof the plaintiff, a child of tender years, strayed upon the said lands, and was injured by a certain dangerous machine, namely, a turning-table for engines, then kept by the defendants upon said lands; that the defendants negligently erected and kept a certain dangerous machine or contrivance, to wit a turning-table for engines, completely unguarded and insecurely fastened in a field their property, adjoining the public highway, near Navan; that the said field was not properly fenced, and a track or footpath led into it from the said highway, which track or path was frequently used by the members of the public, and to the knowledge of the defendants; that the defendants were aware that children were in the habit of using the said path and of entering into the said field, and of playing with and on the said turning-table, and setting it in motion, yet the defendants negligently took no precaution against the danger arising to children from the said matters, in consequence whereof the plaintiff, while playing with

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or on the said turning-table, or near thereto, was seriously injured as aforesaid; that the defendants negligently and improperly erected and kept the turning-table in a dangerous and unsafe condition in the said field, close to the public highway, said field being at the time insecurely fenced from the highway and with a path or track leading into and through it therefrom, and that the plaintiff was by the acts and default of the defendants induced to enter on the field and to play with and on the turning-table, in consequence whereof he was severely injured. The defendants denied negligence, pleaded contributory negligence, and alleged that the negligence (if any) of the defendants was not the effective cause of the injury.

The facts are fully stated in the judgments.

The following questions were submitted to the jury, the answers to which are appended:—

(1) Was the fence in a defective condition? *Answer*—Yes.

(2) If so, was it through the negligence of the defendants? *Answer*—Yes.

(3) Was the boy allured through the hedge and up to the turn-table by the negligence of the defendants? *Answer*—Yes.

(4) Was it by reason of the negligence of the defendants, and as the effective cause of it, that the misfortune occurred? *Answer*—Yes.

(5) What damages (if any)? *Answer*—£550.

On these findings the learned Judge gave judgment for the plaintiff for £550 with costs.

The defendants now moved for an order that the findings, verdict, and judgment, given and entered at the trial, should be set aside, and that judgment with costs should be entered for the defendants, or in the alternative, for a new trial, on the grounds (*inter alia*) that there was no evidence of any negligence on the part of the defendants, or that such negligence (if any) was the effective cause of the accident.

Fetherstonhaugh, K.C., and *Meredith*, K.C. (with them *Healy*, K.C.), for the defendants.

The Solicitor-General (*Redmond Barry, K.C.*) and *Matthew J. Bourke, K.C.* (with them *Dudley White*), for the plaintiff.

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Dec. 5.

KENNY, J.:—

This action was brought for recovery of damages for injuries sustained by the plaintiff owing to the alleged negligence of the defendant Company. It was tried before the Lord Chief Justice, who left the following questions to the jury, all of which they answered affirmatively in the plaintiff's favour, and assessed the damages at £550:—

1. Was the fence in a defective condition?

2. If so, was it through the negligence of the defendants?

3. Was the boy allured through the hedge and up to the turn-table by the negligence of the defendants?

4. Was it by reason of the negligence of the defendants and as the effective cause of it that the misfortune occurred?

The circumstances were shortly these:—A bridge crosses the defendant Company's line at a point some quarter of a mile from the town of Navan—and, in the vicinity of and adjoining the line at this point, lies a piece of ground, the property of the Company, which is utilized by them for the purposes of a siding and turn-table. At some distance from the bridge there is an entrance-gate leading to this piece of ground and thereby shutting it off from the high road. As the latter ascends to the top of the bridge there is a clay bank and hedge on one side, which are supposed to afford protection from accident to those using the road and at the same time to fence off the road from the land. At the other side of the bank and hedge the ground, as one approaches the top of the bridge, slopes down to the piece of land I have referred to, where the siding and turn-table are situated. In the hedge, at a point where the gradient of the road has increased, is a hole of comparatively large dimensions, which, I would gather, had been originally made, possibly by children or animals, and at the time of the happening of this injury to the plaintiff, it was, according to the evidence, large enough to allow of a child, if not, indeed, an adult, getting through and clambering down the slope and on to the Company's premises. Indeed, there was evidence that something in the nature of a step existed in the clay bank, which facilitated

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an entrance through the hole in the hedge. The plaintiff, who was a little child, aged at the time of this occurrence between four and five years, was produced at the trial as a witness; but, on account of his not being able to apprehend the obligation of an oath, was not sworn. He replied to questions put to him, and his answers seem to have been accepted by all parties as evidence. His account of the accident was that on this evening (Sunday, the 18th June, 1905) he came from Navan with two other boys named Monahan; that he got through the hole in the hedge, and went down the slope to the turn-table; that he saw no other boys there but the two Monahans; that he was placed on the turn-table by them in order to get a jaunt; that the table revolved, and that in the course of one of its revolutions his leg was caught between it and the wall within which it revolved, and was crushed to such an extent that it had to be amputated. One of the Monahan boys, aged between nine and ten years, corroborated the plaintiff's story to some extent, but he added that the turn-table was turned by "three stronger boys" whom he did not know, and whose identity was not established. Evidence was also given that the turn-table had been in position about two years; that before its erection the ground had been utilized for the storage of wood; that children from the town used to come to the place and play amongst the timber, and that since the turn-table was placed there children and adults used to resort to this spot. The suggestion was that they were allowed to do so by the defendant Company with impunity. A witness named Fowler, who was examined on behalf of the plaintiff and who was a ganger in the defendants' employment, however, admitted that on the occasions when he saw children playing there he hunted them away, because they were trespassers. He said he had seen children riding on the turn-table two or three times before this accident, and that it was a dangerous thing. Furthermore, it appeared that the gate leading from the road was locked, and that there was a notice-board inside it in a conspicuous position, with a notice on it conveying warning to trespassers with reference to the turn-table. The witness who made a map of the *locus in quo* having stated that there was only a slight catch on it to prevent its moving, advanced the opinion that it was most unusual to find a turn-table with

nothing but a catch or clasp such as this to keep it in position. He added that the way the clasp would be fastened would be by sliding a bolt, and that the child in this case could have pushed it back, and that such a construction was unusual. Fowler, the ganger, on this point deposed that a child might move the bolt, but that it would take a very strong man to move the turn-table. He further swore that on the morning of the occurrence the table was properly bolted.

The defendants gave no evidence.

At the conclusion of the plaintiff's case counsel for the defendants submitted there was no evidence of negligence proper to be submitted to the jury, and asked for a direction; and the Chief Justice in his report states that the only question for our consideration is, whether there was evidence of actionable negligence to go to the jury. It will be observed that the trial proceeded altogether on the basis of negligence, and that no question of nuisance was suggested or submitted to the jury.

The Chief Justice in his report also states as follows:—"I had originally written down the word 'such' before the word 'negligence' in the 4th question; but it struck me that perhaps this might possibly confine the question of negligence to the condition of the fence and to the alluring to the turning-table. I therefore informed counsel I would strike out the word 'such' in the 4th question, so as to leave the whole case open to the jury—including what took place on turn-table and condition, character, and action, and alleged use of the turning-table, which had been so fully discussed during the trial." The 4th question being thus addressed to negligence in the abstract, it is quite impossible to say what was the concrete act—the concrete breach of duty—that, in the opinion of the jury, constituted the actionable negligence which was the proximate cause of the accident. Was it the non-repair of the fence, or the unprotected and unfenced condition of the turn-table, or the insufficiency of the clasp or catch of the latter, or of the bolt that held the clasp in its place? These were all suggested in the evidence as constituting acts of negligence; and I would assume from the extract I have read from the report that the Chief Justice in his charge drew the attention of the jury to each of these matters. The question of the fence stands in a category by itself, and I

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shall presently deal with it; but, as to those other acts, I confess I am unable to see how an obligation on the defendants, the breach of which would constitute an act of negligence, can be established to use upon their own premises and for their own purpose a particular class of turn-table, or clasp, or bolt, or to erect a fencing about the turn-table. The question of nuisance, as I have said, was not suggested at the trial. If it had been, it might have become necessary to submit some additional questions to the jury. This machinery was on the defendants' premises, and at most the plaintiff was in the position of a bare licensee. I think that as such he must be regarded as accepting all the risks attendant on his having come upon the ground, and that there was no duty cast on the defendants to take due and reasonable care of him or to see that he should not go to a dangerous place: *Batchelor* v. *Fortescue* (1).

As to the fence, it was contended that under the 68th section of the Railways Clauses Act, 1845, there was a statutory duty on the defendant Company to fence off their premises from the road, and that their not having adequately done so was the cause of the accident, by reason of the child, being unintelligent and unappreciative of danger, having been tempted or allured into a position of peril by such an easy mode of access as the hole in the hedge afforded. The defendants' counsel, for the purpose of argument, were willing to admit that the answers of the jury to the first two questions were correct, and that consequently there was negligence on the defendants' part in permitting the fence to be in the condition in which it was. The question for our decision is, as Walker, L.J., puts it in *Sullivan* v. *Creed* (2), was this negligence the effective cause of the accident, or, in the language of FitzGibbon, L.J., in the same case, ought a man of ordinary prudence, having regard to all the circumstances, to have anticipated the injury as a not improbable consequence of his action. The Judges in the Court below in *Sullivan* v. *Creed* (2) regarded it as near the border-line—almost admitting of a decision either way—and Holmes, L.J., towards the close of his judgment in the Court of Appeal, in dealing with the question

(1) 11 Q. B. D. 474. (2) [1904] 2 I. R. 317, at p. 355.

of negligently laying aside a loaded gun, expressed the opinion that the person doing so ought to contemplate that it might be taken up by a person who might handle or use it negligently, but he thought, without deciding it, that it would not be within reasonable contemplation that the finder of it would wilfully discharge it at another. Was there a duty cast on the defendants to anticipate what occurred to the plaintiff in the present case, and was the misfortune a reasonably probable one? I confess I cannot see the connexion between the initial act of negligence in leaving the hole in the hedge unfilled or unrepaired and the crushing of the boy's leg on the turn-table. He could have obtained access to the defendants' premises in at least one other way, namely, by climbing over the gate; and unless the liability of the defendants is to be attributed to some acts of negligence other than the non-repair of the fence, the manner in which the child approached the turn-table seems to me to be unimportant. The non-repair of the fence was, in my opinion, no more operative than if the child had climbed the gate or gained entrance from a field at the other side of the turn-table. The accident did not arise immediately out of the negligence by non-repair which is alleged to have given occasion and opportunity for the child's interference, or that of his companions, with the turn-table. Suppose the plaintiff had gone into the grounds through the aperture hours before his accident, and had been joined by companions, some of whom also effected an entry through it, and others of whom came over the gate or across the field, could it be said that the defendants were liable for an injury to the children who came through the hedge and not liable if the injury happened to any of the others? The child was on the ground, no matter how he got there; the accident might have taken place, no matter how he got there; and in no sense can I see how the chain of cause and effect can be established between the mode of access and the injury. The former was not, in my judgment, a *causa causans* or a *causa sine qua non*. If there was an allurement or temptation, it was not a hole in the hedge that tempted or allured, but the piece of ground at the bottom of the slope, which may have been regarded by the children as a sort of play-ground. Why ought a prudent person to have anticipated what did occur? Why

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should the accident be regarded as a not improbable consequence of the non-repair of the fence, even admitting the natural instinct of a child to amuse himself by playing with dangerous things, or to go into dangerous places? If the defendants are liable here, they would, it seems to me, be equally liable if the child had hurt himself on the Company's premises in any other way. Suppose he had tripped on one of the rails of the siding and hurt himself; or I will take the admirable illustration put by my Lord Chief Baron in the course of the argument, and suppose there was a tree on this ground with a rotten branch, and a boy had climbed on to it, and the branch broke with him, and he was injured. In these cases the defendants would be liable if they are liable under the present circumstances. Indeed, the argument in favour of liability would be stronger, for the accident would, if a consequence at all of the original act of negligence, be a more direct and immediate one. The acts that in reality caused the injury to him were those of the plaintiff's companions who set him up on the table, and of the "three stronger boys" who then set the table revolving. In *M'Dowall* v. *The Great Western Railway Company* (1), in dealing with the conduct of the boys who uncoupled a van and thus allowed it to run down an incline and injure the plaintiff, Vaughan Williams, L.J., points out the several operations they had to go through to cause that to happen which did happen, and adds, that there was nothing in the past history of their conduct to lead one to anticipate that they would go and uncouple a vehicle and let it run down the incline, as they did in that case. So, I ask, what is there here in the past history of the conduct of the plaintiff and his companions to lead any prudent person to anticipate that they would unclasp the turn-table and be able to apply the necessary amount of force to set it in motion?

I should wish to refer to one other authority in the Court of Appeal in this country, the case of *Adderley* v. *The Great Northern Railway Company* (2), which was decided subsequently to *Sullivan* v. *Creed* (3). The action was tried before myself at the Londonderry Assizes, and resulted in a verdict for the

(1) [1903] 2 K. B. 331. (2) [1905] 2 I. R. 378. [1904] 2 I. R. 317.

plaintiff. The short facts of it were these: the plaintiff was a passenger in a train on the defendants' line, and at one of the stations at which the train stopped a drunken man had gained access to the platform, and, in his attempt to enter one of the carriages, from doing which the station-master and a porter sought to restrain him, he struck and smashed the window of the carriage in which the plaintiff was seated, and a portion of the broken glass struck the plaintiff and seriously injured his eye. The drunken man had been permitted, as the jury found, to pass the ticket-taker, who stood at the door leading on to the platform, and who saw that he was intoxicated. The Divisional Court entered the verdict and judgment for the defendant Company. The Court of Appeal (Walker, L. J., dissenting) directed a new trial. I refer to the case mainly for the observation of Holmes, L.J. At p. 412 he says:—"It is unnecessary for me to offer an opinion as to whether allowing Farry (the drunken man) to go on the platform was evidence of negligence in the abstract; inasmuch as I am satisfied that it did not lead to the plaintiff's mishap in the sense in which cause and effect are understood in actions such as this. The chain of events that ended in the breaking of the carriage window began when the station-master interposed." So in the case before us I am of opinion that the chain of events that ended in the crushing of the child's leg began, not when he entered the Company's premises, but when he was placed on the turn-table by one of his companions.

I am therefore of opinion that there was no evidence of negligence on which the jury could have reasonably acted, and that the verdict and judgment should be set aside, and a verdict and judgment entered for the defendants.

I may say in conclusion that I am clearly of opinion that the 68th section of the Railways Clauses Act of 1845 does not affect the defendants' liability in the case.

JOHNSON, J.:—

I limit my judgment to the question of negligence which was argued. The question to be determined is—at the close of plaintiff's case was there evidence of actionable negligence proper to

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be submitted to the jury? The defendant Company gave no evidence, and their leading counsel states, and probably with prudence, that he would not accept a new trial if the Court proposed to grant one. There is no question on the amount of the damages. Under these circumstances, if on any construction of the evidence which the jury was authorized to give to it, or by any inference they were authorized to draw from it, they found that the defendant Company had omitted that care to prevent the occurrence which a reasonably prudent man would not have omitted in similar circumstances, then they were at liberty to find for the plaintiff; and in this they were, in my opinion, entitled to take into consideration the special circumstances of the case, and the age, inexperience, natural instincts, and ignorance of danger of the plaintiff, a child of tender years, and of the children, his companions.

The defendants' railway crosses the public highway from Navan to Trim, which is carried over the railway by a bridge immediately approached by a road on an embankment sloping down from the bridge to the level of the road from which it rises. This work was executed under the powers given by the Dublin and Meath Railway Act, 1858, incorporating the Railways Clauses Act, 1845, which (sect. 46.) requires the defendant Company at all times to maintain the bridge, with the immediate approaches and all other necessary works, at their own expense; and sect. 50: "There shall be a good and sufficient fence on each side of the bridge of not less height than 4 feet, and on each side of the immediate approaches of such bridge of not less that 3 feet." The immediate approach of the bridge on the Navan side was fenced by a clay bank in front of a line of quicks inside the bank, old and ragged, and in several places their branches did not meet. At the time of the occurrence, a few yards from the commencement of the slopes of the approach of the bridge from the road from Navan, was a large gap in the clay bank which fenced this approach, made by the continual passing of persons over it into a "regular beaten gap," 2 feet 6 inches high from the roadway—"a common path," "a regular beaten gap," about 2 yards wide, easily accessible from the road by grown persons and by children, worn smooth and showing the amount of traffic through and over it.

Inside the banks through quicks (which did not meet) a gradual sloping descent, rough with footsteps down which children could run led by "an obvious beaten track where the grass was worn away," to the piece of rough ground called "the triangle." The defendant Company, in violation of their statutory duty to keep in repair the fence of this approach to the bridge, were guilty of negligence; their initial negligence is the prime factor which pervades the whole case. Since the occurrence the defendant Company has repaired the fence and closed this gap by upright substantial posts with wooden bars nailed across, admitting thereby their liability to maintain the fence. Defendants' ganger, Fowler, said this was put up next day, and, to the Chief Justice, said that was where the boy came through. The triangle is a rough piece of waste ground, the property of the defendant Company, fenced off on one side by the embankment of the approach from Navan, on another side fenced off from the adjacent fields. There is a locked gate in the angle formed by this fence and the end of the slope of the approach from the Navan road. The base of the triangle so formed is the main line of the defendant Company. Inside the gate is a post with a board for posting notices. The evidence is conflicting, whether at the time of the occurrence a notice cautioning trespassers was affixed to this board; but if there was, it is clear that it was habitually disregarded to the knowledge of the servants of the defendant Company. In this triangular piece of ground the defendant Company, at some time from two to four years before the occurrence, constructed a turn-table, with a short branch to it from their main line, ending in a dwarf brick wall where it meets the turn-table, with a corresponding line and wall on the opposite side of the turn-table. When it was required to use the turn-table, in order to enable the engine to come on it, the rails of the turn-table were brought into line with the rails of the branch railway and locked together into one line by a loose sliding bolt lying under the flange of the rail, pushed by hand under the flange of the corresponding rail—thus, as long as the bolt was left in that position, forming a continuous line of rails—the engine then ran on the turn-table. This sliding bolt was then withdrawn by hand; the turn-table revolved, and when the engine was again in position, the lines were again locked

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into one line by the bolt being projected under the flange of the corresponding rail, and the engine was then in position to return to the main line. This bolt was not, and was not capable of being, secured in any way; it was a sliding bolt merely pushed to and fro with the hand. If, when the rails were locked into one line and the turn-table was not in use, a short bolt with an aperture at one end for a padlock was passed through corresponding holes in the rail and the sliding bolt so as to retain the rails locked into one line, the turn-table would have been effectually prevented from being moved when not required for use by the defendant Company, the key of the padlock being kept by their servants.

This sliding bolt was movable with great facility. In reply to a juror's question—"Had you to use a stone to move the bolt?" —Fowler (a ganger of the defendant Company, who appears to have been in charge of this turn-table as far as anyone had charge of it) said, "Certainly not"; and his evidence to the Chief Justice is—"What force did you use?" "Well, I can shift it with my hand—it is always free." "Could a little boy shift it?" "Oh, yes; anyone that could use any force at all." And, in reply to the question of the Solicitor-General, "Was this turn-table easily moved?" Barnes, the civil engineer, said, "Yes, you could move it with your finger—I did so." Fowler also said, "On the Sunday morning the table was in its proper position; it was bolted." He did not say at what time this was; and if his evidence was true, it was probably several hours before the child was injured. But it was for the jury to decide whether and how far they gave credit to his testimony. This, however, is clear, that for a considerable period of that Sunday no servant of the Company was present in charge of the machine, or near it, or about the place. Fowler's evidence as to what occurred the morning following the injury is in direct conflict with that of Cooke, the child's father, who says that Fowler then tried to fasten the table by the sliding bolt, but did not succeed; that the sliding bolt was unworkable, and seemed to be rusty. Fowler was not a very reliable witness; he subsequently contradicted his admissions; his personal interest (if the defendant Company had given the charge of the machine to him) was involved. The Chief Justice considered him a witness hostile to the plaintiff,

and it was for the jury to decide whether and how far they believed him. The evidence of plaintiff's sister is that, long before the turn-table was constructed, the Railway Company used to cart timber to this waste ground; that it was a place for children to play in, and they played see-saw with the timber lying about; and since the turn-table was there, and before this occurrence, she frequently saw children and grown persons playing with the turn-table, setting it at full go. The triangle is in full view of the railway bridge, and it does not appear that any proceeding for trespass was ever instituted by the defendant Company. Tully's evidence is that he used to see children coming there on Sunday evenings; and that on one or two Sundays before the plaintiff was injured, from the railway bridge "I seen a lot of children on the table, and the table would go round about like that; and when the table would go round, they would then push them off," and that as soon as the table was put there the children would be playing at it. A bit of green lies back from the turn-table, so that when you get to the turn-table you could not see any path, but you would see a path to the turn-table. Tully lived about 60 perches from the place, and passed it every day, and never saw anyone turn the little boys from it (the table). Fowler (the ganger) said he was often about the place, and often saw children playing at the turn-table—going back for the past couple of years—adjusting the table and riding on it, and that it was a dangerous thing; and that he saw it two or three times before this occurrence. He also said that Monahan, the father of the young Monahans (a district inspector of the Railway), was over him, and all over the place—that it was his duty to report to Monahan anything he did and anything he saw, and that he did so. On cross-examination he says he could not be particular when before this occurrence he saw children on the table, but it was about twelve months, and they ran away when they saw him. But the jury had evidence that the defendant Company had notice how notoriously grown persons and children played with this dangerous machine; and the condition of the gap, as I have mentioned, showed how much traffic passed over it. On Sunday, 18th June, 1905, the plaintiff's child, four and a-half years old, met with the two Monahans, sons of the district inspector of the defendant Railway—Pat, the

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elder, nine and a-half years, and Charlie, younger. One of them said, "to go up for a jaunt." "I went up to the railway," they said, "to come over and get a jaunt." The terms of the invitation show familiar acquaintance with the place, and familiarity with the turn-table. They went through the gap and to the turn-table. Pat Monahan's evidence is that he had been there before, and swung on the turn-table once before, and once that day, presumably before the child was injured. The plaintiff's statement was—"They put me on the table, the wheel went round, and my leg" (obviously in ignorance of the danger of hanging over the edge of the table) "caught in the wall," *i.e.* the wall where the branch line meets the turn-table, and the child's leg was crushed. The Monahans made off, leaving the child where Finnegan found him.

Pat Monahan says three stronger boys whom he never saw before or after turned the table—where they came from or where they went they did not know. The plaintiff's statement was "they (the Monahans) put me up on the table."; and when recalled by the Solicitor-General, he said Pat and Charlie Monahan were with him, and no one else at all at the turn-table, and that he saw no other boys there at all, except Pat and Charlie Monahan. No jury would have had any difficulty in discounting the evidence of Pat Monahan; but, even if true, it afforded no defence to this action. Finnegan returning to Navan about 5.30 heard the child's cries—went down through the gap, the worn pass, without the least difficulty, and brought up the plaintiff in his arms through the same gap, took him to the hospital; and the following day the leg was amputated, and he is crippled for the rest of his life. The initial negligence of the defendant Company, leaving the road-fence dilapidated in breach of their statutory obligation, permeates the whole of the case. It was common knowledge that in the triangular piece of ground to which the path through the gap in this fence led, was this turn-table, unfenced, unguarded, easily set in motion for a jaunt and amusement to those who rode on it. The jury had evidence that the defendant Company, through their servants, had notice that young children, enticed by the facility of access through the broken fence, found their way to this piece of ground in which the turn-table was placed, and, resorting there for amusement with the natural instincts of the young, played with

the turn-table which they found there, ignorant of the danger of meddling with it—rode on it, and were spun round on it. While the defendant Company suffered this state of things to exist and continue (which amounts to implied license) it was their duty to take ordinary and reasonable precaution by repairing the road fence in discharge of their statutable duty, and effectually excluding children from the triangle, or by rendering this dangerous machine innocuous, and securing it from the danger which they must reasonably have anticipated would arise from its being played with, and which would be productive of injury, if unjustifiably set in motion; but they omitted the reasonable care which any ordinary prudent person would have taken in the circumstances, and let their omissions of reasonable care drift on until they culminated in the child's crushed limb and maimed life through their negligence, which was the effective cause of the injury to the plaintiff, even though the immediate cause was the child being put on the table by the Monahans, and the machinery set in motion to give him a "jaunt" or ride on it. The authorities on the intervention of a third person from *Lynch* v. *Nurdin* (1) to the present time are largely cited and commented on in *Sullivan* v. *Creed* (2), and I do not propose to occupy further public time by going through them.

PALLES, C.B.:—

There is but one question for us here, and to that I intentionally confine myself. The learned counsel for the defendants have expressly disclaimed asking us to send this case for a new trial, and have deliberately confined their contention to have a verdict directed for them. I do not enter upon a consideration of the questions left to the jury, of the alteration in one of those questions to which my brother Kenny has called attention, or of the terms in which the Lord Chief Justice left the questions to the jury. Was he, or was he not, right in leaving the case to the jury; or ought he to have stopped it at the close of the evidence, and directed a verdict for the defendants?

The plaintiff's case was rested upon two distinct matters, his

(1) 1 Q. B. D. 29.

(2) [1904] 2 I. R. 317.

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counsel relying, in the first instance, upon each of them separately, and then upon both in conjunction. The first was, negligence in the defendants, by permitting the fence upon the approach to the bridge to be out of repair. The second was that the turn-table was, in relation to a child so young as the plaintiff, if invited or permitted to approach it, not only a danger, but a concealed danger. A decision that there was evidence that the neglect to fence caused the injury, or a decision that the defendants were, as regarded the plaintiff, negligent in not securing the turn-table, so as to prevent its revolving, except under the care of the defendants' servants, would sustain the present verdict.

I regard each of those questions as a difficult one; but, after full consideration, I have arrived at a conclusion in favour of the plaintiff upon the first of them, and for that reason I hold that the verdict should not be disturbed. I have also formed an opinion in favour of the plaintiff on the second question; but, as to it, I am not so clear as I am on the first, and I prefer not to rest my judgment upon it.

The first question involves two considerations—First, was there negligence on the part of the defendants? and, secondly, if so, ought the case to have been withdrawn from the jury, on the ground of the contributory negligence of the child? As to the first point, sect. 50 of the Railways Clauses Act, 1845, is material. It enacts that "there shall be a *good and sufficient fence* on each side of the bridge, of not less height than 4 feet, and on each side of the *immediate approaches* of such bridge of not less than 3 feet."

The primary or most obvious object of this section was to afford the public protection against falling down the embankment; but its object is not limited to this, nor is it limited at all; and, to apply the words of Pollock, B., in *Williams* v. *Great Western Railway Co.* (1): "It is not for us to speculate on what was the precise intention of the Legislature when they required that there should be" such a fence. "It is sufficient to say that the defendants have neglected to comply with the enactment," which I hold to be one for the protection of the public generally, and one to be dealt with according to the circumstances of each particular case.

(1) L. R. 9 Ex. 161.

Thus the question is reduced to whether there was evidence that the neglect to provide a sufficient fence was the *causa causans*, the efficient cause, of the injury?

In reference to the facts of the case, those material to the determination of the question have been so fully stated by my brother Johnson, that I do not propose to occupy public time by repeating them.

The principle of law applicable to such a case as the present is, in my opinion, now well settled. The application of this principle has been under consideration in a vast number of cases; and the mode in which it has been applied, as distinct from the principle itself, can hardly be said to have been uniform. As is well said by Lopes, L.J., in *Engelhart* v. *Farrant* (1):—

> "It is impossible to reconcile the various decisions with regard to negligence; and the reason is that fact and law are so mixed up in them that they are frequently decisions rather on the facts than on the law, and the variety of facts involved is infinite."

I confess, however, I think that, in addition to that, there is a question of law involved, as to which some of the cases are inconsistent, and a question which this Court will have to decide one way or the other in the determination of this case. Indeed, it seems to me that in modern times the principle has been applied with more elasticity than formerly; and that, while the principle itself has remained unaltered, there has been a beneficial development or evolution of its application, so as to adapt it more closely to the necessities of modern times. The principle itself was much considered, both in this Court and in our Court of Appeal, in *Sullivan* v. *Creed* (2). The injuries, the subject of consideration there, were caused by a gun which, in play, was fired at the plaintiff by the defendant's son, who did not know that it was loaded, and who found it standing at full cock inside a fence, upon his father's land, beside a private path, where it had been left by his father, the defendant. Mr. Justice Gibson, after referring to the well-known cases of *Lynch* v. *Nurdin* (3) and *Clark* v. *Chambers* (4), says:—

(1) [1897] 1 Q. B. 246.
(2) [1904] 2 I. R. 317, 335.
(3) 1 Q. B. D. 35.
(4) 3 Q. B. D. 327.

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"The principle of these cases is clear, 'but the tendency of a given act to cause harm under given circumstances must be determined by experience.' As to the circumstances necessary to be known to make a man liable for the consequences of his act, 'they must be such as would have led a prudent man to perceive danger, though not necessarily to see the specific harm.' The question of liability depends on the particular circumstances, including the nature of the dangerous article, the place, the persons likely to be brought in contact with it, and the time. . . . Where the article is known, according to common experience, to exercise an allurement, temptation, or fascination even, particularly over young persons, to meddle with it, the utmost care ought to be taken. . . . Young persons are more likely to be imprudent than those of mature years. . . . The question before us is whether, under the circumstances proved in the case, having regard to place, time, and persons likely to see the weapon, a prudent person ought to have foreseen danger to others from the gun being left where it was, exposed on full cock."

In giving judgment in that case in the Court of Appeal, FitzGibbon, L.J., says (p. 335) :—

"The principle to be derived from the numerous authorities seems to be this :—Where an injury has been suffered, which would not have happened but for the action of more than one person, no one of the several persons whose action led up to the injury will be answerable in damages for it, unless his action *caused* it; and it should be held to have caused it if a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the injury as a not improbable—likely is too strong—consequence of his action. If so, he is responsible, notwithstanding that the injury would not have happened but for the independent act of a third party. All third party cases are difficult, because, in tracing the chain of cause and effect, circumstances often make it almost impossible to distinguish between a flaw and a break, or to say whether the intervention of the third party has not so far predominated in bringing about the injury as to make it right to say that the act of the original party was not an effective cause of the ultimate result."

I do not think it necessary to refer to any of the cases previous to *Sullivan* v. *Creed* (1), with the exception of one. All of them are elaborately and lucidly discussed in the judgments of Mr. Justice Gibson in the King's Bench, and of the Court of Appeal; but one word must be said in reference to *McDowall* v. *Great*

(1) [1904] 2 I. R. 317.

Western Railway Co. (1), the decision in which of Kennedy, J., was relied on in *Sullivan* v. *Creed* (2), but which was subsequently reversed in the Court of Appeal. There the defendants' servants shunted some trucks and a brake-van, which were coupled together, on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch-point, which would have prevented the vehicles, if set loose, from running down the incline; but for the convenience of their shunting operations the defendants' servants, instead of placing the trucks and van beyond the catch-point, screwed down the brakes, and left them in a position in which they could not have caused any damage, if not interfered with. Boys had been in the habit of breaking into the vans or trucks standing on this part of the line, and stealing apples; but there was no evidence that they had ever loosed a van or vehicle before, nor was there evidence of anything in the past history of the conduct of the boys, as regarded vehicles left on the rails at this point, to lead one to anticipate that they would uncouple a vehicle and let it down the incline. The defendants were aware of this conduct of the boys. The action was brought for injury sustained by the plaintiff, who was lawfully passing along the highway over the level crossing. The injury sustained by him was by reason of the boys trespassing on the siding, and doing what had never been done before, viz., uncoupling the van from the trucks, and releasing its brakes, so that it ran down the incline, and caused the injuries complained of. Upon these facts, Kennedy, J., held the defendants liable. His *ratio decidendi* is thus expressed :—

> "If, as the jury have found, the risk of interference by trespassers with trucks and vans in this locality was a risk known to the defendants, and if the consequent danger of their movement down the incline to the highway was also a known risk, and if, further, this danger might have been guarded against by the exercise by the defendants of reasonable care, as the jury have also found, I can see no legal reasons upon which the defendants can claim immunity merely because the boys were trespassers."

This judgment, as I have already stated, was reversed in the

(1) [1902] 1 K. B. 618. (2) [1904] 2 I. R. 317.

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Court of Appeal. It was there held that, at the conclusion of the plaintiff's case, there was no evidence of any neglect on the part of the Railway Company of any duty, the neglect of which would have led to the accident. The ground of the decision, as stated by Vaughan Williams, L.J., was as follows:—

> "I wish to point out that this van was not only placed in a position where it was safe, but also that it was placed there under conditions to make it safe. It was locked up, it was braked, and it was coupled by a screw coupling to the train. Under those circumstances, for this interference by these boys, who were so neglectful of the safety of other people, to cause that to happen which did happen, they had to go through a very considerable operation. They had to break into the van, or get into it with keys, which it is suggested they did; and when they got there, they had a great deal to do before this van could be loosed and allowed to run down the incline. . . . It is quite true that the boys had been in the habit of breaking into the vans or trucks standing on this part of the line and stealing apples, and doing one thing and another; but although it is said the boys had been in the habit of doing this for years, there is no evidence that they ever loosed a van or vehicle before, during all that time; and therefore it seems to me there is nothing in the past history of the conduct of those boys, as regards vehicles left on the rails at this point, to lead one to anticipate that they would go and uncouple a vehicle, and let it down the incline, as they did in the present instance."

This train of reasoning plainly intimated that, in his opinion, if there had been anything in their past conduct which reasonably would have led to the belief that they might resort to this act, and if that had been known to the defendants, they would have been liable. Romer, L.J., says:—

> "It does not appear to me that, upon the evidence, a jury could reasonably find that the Railway Company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do, or might have done, what they in fact did, or that there was at the time, known to the Company, any such risk of the particular acts of the boys which caused the accident, as called upon the Railway Company to take further precautions against those particular acts."

His judgment, too, is based upon the character of the acts that had previously been done to the knowledge of the defendants, and suggests that if there had been evidence of knowledge by the

defendants that acts had been done previously of the character of that which caused the injury, the defendants would have been liable. Stirling, L.J., says:—

> "Was there any evidence to show that the Company ought reasonably to have anticipated such an occurrence? He (the learned Judge) says that for years the defendants had been troubled by boys trespassing on this part of the line, and playing in and about vehicles standing upon it; and later on he says that, to the knowledge of the defendants, the boys used to get into trucks and vans, and unlock the doors of the vans on the siding. That is the whole length the evidence went. Nothing further has been called to our attention. That had gone on for years, and no accident of any kind had occurred. In those circumstances, it does not seem to me a fair inference to draw, that the Company ought to have reasonably anticipated any such act as was actually done by the boys in this case, or the result which came from it."

This decision, although it reversed the previous judgment of Kennedy, J., is not only not inconsistent with the decision in *Sullivan* v. *Creed* (1), but recognizes the principle in almost identical terms with that upon which *Sullivan* v. *Creed* (1) was decided: "Could the jury reasonably find that the Railway Company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do, or might have done, what they in fact did, or that there was at the time, known to the Company, any such risk of the particular acts of the boys which caused the accident, as called upon the Railway Company to take further precautions against those particular acts?"

My opinion is, that these two decisions—the one in this country, of *Sullivan* v. *Creed* (1), and the other in England, of *McDowall* v. *Great Western Railway Company* (2), have definitely settled the law, in accordance with the principle of previous decisions; and that the question we have to determine here, and the only question now open to us, is the application of that principle to the present case.

Now, as I have already said, I will not recapitulate all the facts of this case, which have been so lucidly embodied in the judgment of my brother Johnson, but I will call attention to

(1) [1904] 2 I. R. 317, 335. (2) [1902] 1 K. B. 618; [1903] 2 K. B. 331.

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some salient matters. There is evidence, first, that children had, for years, to the knowledge of the Company's officers, been in the habit of entering upon this triangular piece of ground; and, secondly, that they were in the habit of playing upon this turn-table, part of their play consisting in revolving that turn-table, and when so revolving getting a jaunt upon it. That circumstance is, to my mind, a conclusive answer to the argument of my brother, Mr. Justice Kenny, that, applying the principle of *McDowall* v. *Great Western Railway Co.* (1), it ought to be asked in this case, "How could the defendants have reasonably anticipated that those children would unlock and remove the bolt of this turn-table, any more than the Company, in *McDowall's Case* (1), could reasonably anticipate that the boys would let loose the van?" The answer is, that in *McDowall's Case* (1) the boys never had done such an act before; in the present case, there is evidence that they had committed the act before, to the knowledge of the servants of the defendant Company. There is also evidence that at one point the turn-table so closely approached the wall, that were a child sitting upon the table, with his legs dangling down over the edge, he must inevitably have been crushed and injured. There was, therefore, in my opinion, evidence that the Railway Company, through their servants, must or ought reasonably to have anticipated that children would mount upon the turn-table, play upon it, and make it revolve whilst they were on it, as they had been in the habit of doing before; and I think it was not outside the province of the jury to have found that the defendants ought to have anticipated danger to the children, in the course of such dangerous performances. It was not necessary, in the words of Gibson, J., in *Sullivan* v. *Creed* (2), nor in my own opinion, that they should have anticipated the specific mode in which the injury was actually caused; but were it necessary that they should, I should have no difficulty in holding that the jury might have drawn such an inference; and if they might, we should, having regard to their verdict, assume that they have done so. I may remark that in *McDowall's Case* (1) the Court of Appeal held that there was

(1) [1902] 1 K. B. 618; [1903] 2 K. B. 331. (2) [1904] 2 I. R. 317.

no evidence of any initial negligence at all upon the part of the Railway Company. To this it is to be added that, in the present case, the defendants, by providing an efficient bolt, capable of being opened only by a key, which could be kept in the custody of their own employees, might have effectually, and without substantial interference in the carrying on of their business, have made this turn-table absolutely safe. Applying, therefore, the principle which I hold to have been settled by *Sullivan* v. *Creed* (1) and *McDowall* v. *Great Western Railway Company* (2), in my opinion, evidence that the defendants permitted the fence to be out of repair, and allowed persons to have access to this piece of ground, knowing that children were in the habit of resorting to it for the purpose of playing upon this turn-table, was evidence of negligence on the part of the Company which was a *causa causans* of the injuries.

The second matter involved in this application is that of contributory negligence on the part of the child; and upon that the cases of *Hughes* v. *MacFie* (3) and *Mangan* v. *Atterton* (4) have been relied upon as authorities. Now, I admit that, if the plaintiff had been an adult, and if at the end of his case the evidence showed that the accident was caused by his contributory negligence, the case ought to have been withdrawn from the jury. At one time there was a doubt upon that question. In *Slattery* v. *Dublin, Wicklow, & Wexford Railway Co.* (5), Lord Penzance was of opinion that where there was a question of contributory negligence the case should never be withdrawn from the jury; but in many subsequent cases, including one in which I myself gave judgment, that of *Coyle* v. *Great Northern Railway Co.* (6), it was held that where it was clearly proved, or admitted, that the injury was due to contributory negligence on the part of the plaintiff, the Judge ought to withdraw the case from the jury; and I would hold that if the acts of the plaintiff here were those of an adult, or of a person of full intelligence, they would have been acts that would have rendered it the duty of the Judge to withdraw the case from the jury, and direct a verdict for the

(1) [1904] 2 I. R. 317, 335.
(2) [1903] 2 K. B. 331.
(3) 2 H. & C. 744.
(4) L. R. 1 Ex. 239.
(5) 3 A. C. 1155.
(6) 20 L. R. Ir. 409.

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defendants. But then there arises the question, Can there be contributory negligence in the case of an infant of such tender years as was the plaintiff in this case, four years and two months old?

Now, in my opinion, neither *Hughes* v. *MacFie* (1) nor *Mangan* v. *Atterton* (2), both of which were decisions of courts of first instance, and in one of which the child was four years, and in the other five years, old, was rightly decided; and I think we should decline to follow them. I hold that they are both inconsistent with *Lynch* v. *Nurdin* (3), which is now a leading authority. In some of the cases, *Lynch* v. *Nurdin* (3) was doubted; but my view is that the modern decisions in the Court of Appeal in England and here have set up the authority of *Lynch* v. *Nurdin* (3), so far as related to the alleged contributory negligence of the child, which was the *causa causans* of the injury there. But further, in a case which is now a leading case, that of *Clarke* v. *Chambers* (4), Cockburn, C.J., in delivering the judgment of the Court, thus refers to *Mangan* v. *Atterton* (2), the facts in which were so similar to those in *Hughes* v. *MacFie* (1), that the two cases may be considered as identical:—

> "The case of *Mangan* v. *Atterton* was cited before us as a strong authority in favour of the defendant. The defendant there had exposed in a public market-place a machine for crushing oil-cake, without its being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheel, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable, first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have at present nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we

(1) 2 H. & C. 744.
(2) L. R. 1 Ex. 239.
(3) 1 Q. B. D. 29.
(4) 3 Q. B. D. 339.

do not acquiesce in it. It appears to us that a man who leaves in public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to anyone who touches it, without any protection against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

That was said by Cockburn, C.J., nearly a quarter of a century ago, in reference to the decision in *Mangan* v. *Atterton* (1). Among other cases inconsistent with it, it appears to me that *Crocker* v. *Banks* (2) is an example. In that case the plaintiff, a girl of seventeen, had been for some time in the employment of the defendant, who was a soda-water manufacturer. She was an expert hand, and was engaged at a machine for filling soda-water bottles, and was injured by the bursting of one of the bottles. It appeared that the girl was perfectly aware that the operation was a dangerous one; that a mask was provided for her protection, which she had not put on. She admitted that she knew that large numbers of bottles had burst, and that she had sometimes worn a mask. The foreman and some of the work girls had given evidence that they had recommended her to wear the mask. The case was left to the jury by Grove, J., when a verdict for the plaintiff, with £50 damages, was returned. The defendant appealed, and Lord Esher, M.R., said:—

"Having regard to the tender age of the person employed, the jury were justified in thinking that it was not sufficient for the defendant to provide the masks, but that it was his duty also to point out to such young people the existence of the danger, and to insist on their wearing the masks. Since he had failed to do this, the jury might well say he had been guilty of negligence. Then, was the plaintiff guilty of contributory negligence in not putting on the mask? She had sworn that she did not know of the danger, or that it was necessary to wear the mask at that particular period; and therefore the jury were not bound to say that she was negligent. It was not negligence for a girl of her age to omit to put on the mask if she did not know that she was bound to do so at that period of the operation."

Fry, L.J., and Lopes, L.J., gave judgment to the same effect.

(1) L. R. 1 Ex. 239. (2) 4 T. L. R. 324.

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In support of the plea of contributory negligence, *Mangan* v. *Atterton* (1) and *Hughes* v. *MacFie* (2) were cited, but the verdict was sustained. I may also say that those two cases are entirely disapproved of by a long line of cases in America; and I therefore think I am at liberty to exercise my own judgment in considering whether they were rightly decided. The conclusive answer to them, so far as they apply to the present case, is, that a jury are at liberty to come to the conclusion that a child of the age of four years and two months is incapable of exercising reason in relation to a matter of this description. In my opinion, the doctrine of contributory negligence is entirely grounded upon the fact that man is a reasoning animal, and has no application to the case of a child of such an age as to be incapable of appreciating the danger, and reasoning in reference to it, any more than if he had been a brute animal.

Having arrived at that conclusion, I hold that the case ought not to have been withdrawn from the jury on the ground of contributory negligence.

So much, then, for the first ground, upon which I am of opinion that the verdict should be sustained. Now, as to the second. There is evidence that the defendants permitted, and, indeed, invited children to come into this triangle and play upon the turn-table. What is the principle of law applicable to the liability of an owner who permits another, gratuitously, to enter his property? It is well settled; and I take it from a case which is as favourable to the defendants as any in the books, and was one of those cited by Mr. Fetherstonhaugh, viz., *Gautred* v. *Egerton* (3). It is thus stated by Willes, J.:—

> "Assuming that these were private dykes, the private property of the defendants, and that they permitted persons going to or coming from the dykes, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee."

(1) L. R. 1 Ex. 239. (2) 2 H. & C. 744. (3) L. R. 2 C. P. 374.

In this, and numerous other cases, it was held that the owner of land, under such circumstances, would not be responsible for injury caused by patent dangers, but that he would be liable for concealed dangers of which he was aware, and of which he did not inform the person he permitted to enter his land. I am not aware that the question has ever arisen as to what is to be deemed a concealed danger, in reference to persons who have not all their faculties. Would an owner of land, who, without giving warning of the danger, gave permission to one whom he knew to be blind to go unattended over a path on his land which, to his knowledge, was dangerous to blind persons, be held irresponsible, merely because the danger might be seen, not by his licensee, but by a person who had his eyesight? I gravely doubt it. I rather think he would be liable. If a person gives an article to another that has a concealed danger, undoubtedly he is liable if an injury is caused by it. Then is he not liable if he gives a thing which is patently dangerous to a child of such an age as to be incapable of knowing the danger? Suppose a person gives a loaded pistol to another without telling him that it is loaded, and under circumstances in which he may reasonably believe that it is not loaded, there is ample authority that he would be liable for an injury that takes place by reason of the pistol being loaded. Then, supposing he gives a loaded pistol to a child four years and two months old, is it possible to contend that, by reason of saying something to the child, which the child is incapable of appreciating or understanding, he would escape his liability? or that the danger should not be treated by a jury as, *quoad* that child, a concealed danger? I cannot believe that; and, therefore, were it necessary to decide the case on the ground that the defendants allowed children to play upon this turn-table, which was a dangerous instrument, though patently dangerous, some of the children being so young as to be incapable of knowing and understanding the danger, for myself, I would be willing to sustain the verdict upon that ground. But, as I have said, it is not necessary, in my opinion, to determine that question, which is, to a certain extent, new; and for the purpose of preventing the plaintiff being involved in further litigation, in reference to matters which, up to the present, have not been decided, I purposely refrain from making that one of the

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grounds of my judgment. On the ground that there was here a defective fence, which, on the principle of *Sullivan* v. *Creed* (1) and *McDowall* v. *Great Western Railway Co.* (2), might have been found by the jury to have been the *causa causans* of the injury; and on the ground that, having regard to the age of the child, contributory negligence ought not to have been attributed to him, I agree with Mr. Justice Johnson in holding that the verdict should stand.

Appeal. 1907. Mar. 3, 5, 9.

The defendants appealed (3).

Fetherstonhaugh, K.C., and *Ronan, K.C.* (with them *Healy, K.C.*, and *Meredith, K.C.*), for the appellants:—

We contend that the plaintiff failed to establish any actionable negligence on the part of the Railway Company, and that judgment should have been entered for the latter at the trial. The children who entered upon the Company's premises were simply trespassers: they were not licensees; and there was no evidence of invitation or allurement by the Company. That being so, the tender age of the plaintiff cannot impose any additional duty or obligation on the Company, who were perfectly entitled to keep the turn-table on their own premises for the purposes of their undertaking. The statutory duty of the Company to erect and maintain fences does not include an obligation to erect such fences as would keep out trespassers desirous of entering upon the Company's premises by their own voluntary act; the object of the Legislature was that such fences should be erected as would keep out cattle and sheep, and protect those lawfully passing by from being injured by inadvertently falling through, or straying upon, the Company's premises. Assuming that the plaintiff crept through the hole in the hedge (of which there is no evidence), he could have as readily gained access to the Company's premises by climbing through, or over, a five-barred gate. If the defendants were guilty of negligence in

(1) [1904] 2 I. R. 317, 335. (2) [1903] 2 K. B. 331.

(3) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

respect of the hole in the hedge, such negligence was neither the *causa causans* nor the *causa sine qua non* of the accident. The turn-table was not a dangerous instrument, in the nature of a spring-gun, or a trap, intended to maim possible trespassers; it was there in the ordinary course of the defendants' business as a railway company. *Lynch* v. *Nurdin* (1) will be relied upon by the plaintiff, but that case is distinguishable upon its facts, and the principles upon which it was decided. There the injured child was lawfully upon the street, and, in the language of Lord Denman, "merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse"—the occasion being presented by the negligence of the defendant. Here the child entered upon the Company's premises as a trespasser; and the injuries were received owing to the wrongful acts of his companions in placing him upon the turn-table and setting it in motion. It cannot be said that the turn-table was sufficiently near to the highway to be a nuisance, and, if people choose to trespass, they must take the place upon which they trespass as they find it; if they come to misfortune, they must bear it: *Hounsell* v. *Smyth* (2); *Deane* v. *Clayton* (3); *Hardcastle* v. *S. Yorkshire Railway Co.* (4). *Binks* v. *S. Yorkshire Railway Co.* (5) shows that even licensees "must take their license with its dangers." See also judgment of Palles, C.B., in *Slattery* v. *Dublin, Wicklow, & Wexford Railway Co.* (6); *Bolch* v. *Smith* (7). The result of the authorities is that a trespasser can only recover damages for injuries ensuing from his act of trespass where (1) a trap, *e.g.* a spring-gun, is set for the purpose of injuring him, or (2) the trespass is an involuntary one on or near the boundaries of a highway, or (3), as in *Lynch* v. *Nurdin* (1) and *Sullivan* v. *Creed* (8), where the owner of a dangerous article has negligently left it in such a position that there is a probability of injuries being received from them who are likely to use it. The decision in *Lynch* v. *Nurdin* (1) was doubted by Lord Esher in *Mann* v. *Ward* (9); and see *McDowall* v. *Great Western*

(1) 1 Q. B. 29.
(2) 7 C. B. (N. S.) 731.
(3) 7 Taunt. 489.
(4) 4 H. & N. 67.
(5) 3 B. & S. 244.
(6) I. R. 10 C. L. 256.
(7) 7 H. & N. 736.
(8) [1904] 2 I. R. 317.
(9) 8 T. L. R. 699.

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Railway Co. (1): and the principle there laid down should not be extended so as to cover a case like the present. *Harrold* v. *Watney* (2) and *Barnes* v. *Ward* (3) are clearly distinguishable on the facts. If the child had been properly guarded, no accident would have occurred: *Burchell* v. *Hickisson* (4); *Waite* v. *North-Eastern Railway Co.* (5).

The decision of the Divisional Court, if allowed to stand, would impose intolerable burdens on the owners of property. Those who engage in hunting upon other men's property are trespassers, who presume on not being prosecuted for trespass; but it has never been suggested that one who permits hunting on his lands is debarred from erecting wire fences or high gates, dangerous to the huntsman. If a child is attracted to an orchard, and climbs a tree to obtain the fruit, has he a cause of action if a rotten bough breaks and occasions him an injury? A baulk of timber, or a heap of stones, would have been as likely a source of danger to the young child as the turn-table, once he was upon the defendants' premises.

Matthew J. Bourke, K.C., and *Henry, K.C.* (with them *Dudley White*), for the respondent:—

We do not rest our case on invitation or allurement, or on the fact of the turn-table being a nuisance adjoining a highway, but we contend that the principles on which this case depends are those laid down in *Lynch* v. *Nurdin* (6) and the line of authorities following that decision. *Lynch* v. *Nurdin* (6), which followed *Illidge* v. *Goodwin* (7), has always been recognized as a leading authority: see *Harrold* v. *Watney* (2); *Lygo* v. *Newbold* (8); *Sullivan* v. *Creed* (9). In *Mann* v. *Ward* (10) Lord Esher said that *Lynch* v. *Nurdin* (6) was not in point, and that case was itself discredited in *Engelhart* v. *Farrant* (11). Lord Denman says, in *Lynch* v. *Nurdin* (6): "If I am guilty of negligence in leaving

(1) [1903] 2 K. B. 331.
(2) [1898] 2 Q. B. 320.
(3) 9 C. B. 392.
(4) 50 L. J., Q. B. 101.
(5) E. B. & E. 719, 728.
(6) 1 Q. B. D. 29.
(7) 5 C. & P. 190.
(8) 9 Exch. 320.
(9) [1904] 2 I. R. 317.
(10) 8 T. L. R. 699.
(11) [1897] 1 Q. B. 240.

anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first"; and he lays down that it is impossible to trace the boundary-line between wilful mischief and gross negligence. Liability may ensue, although the place where the dangerous instrument is left is not a public highway or street: *Sullivan* v. *Creed* (1). The Company were affected with knowledge that children were in the habit of playing on the turn-table, and that an accident was likely to result. In *Sullivan* v. *Creed* (1) Gibson, J., said: "The possessor of a dangerous article is bound to exercise diligence for the protection of those likely to be injured by a probable use of such article"; see also judgment of Palles, C.B., in *Sullivan* v. *Creed* (1); *McDowall* v. *Great Western Railway Co.* (2). The statutory duty of the Company, as regards fences, was to erect and maintain "*good and sufficient*" fences: section 10 of the Railways Regulation Act, 1842; section 50 of the Railways Clauses Act, 1845. What is a "good and sufficient" fence is a question that depends upon the circumstances of each case, and is peculiarly a question for a jury. There is ample evidence to sustain the finding of negligence, having regard to the state of the hedge and of the turn-table itself: *Jewson* v. *Gatti* (3). [They also referred to *Nolan* v. *New York Road Co.* (4); *Schmidt* v. *Kansas City Distilling Co.* (5).]

Ronan, in reply.

THE LORD CHANCELLOR:— June 4.

In this case the infant plaintiff, aged between four and five, sustained serious and permanent injury, while riding on a turn-table on defendants' premises, the damages for which injury have been assessed by the jury at the sum of £550.

The facts of the case are fully stated in the judgments of

(1) [1904] 2 I. R. 317, 330.
(2) [1903] 2 K. B. 331.
(3) 2 T. L. R. 381.
(4) 53 Conn. 461.
(5) 59 Amer. R. 16.

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Mr. Justice Kenny, and Mr. Justice Johnson, in the Divisional Court, and it is unnecessary to recapitulate them at any length. Adjoining the defendants' line from Navan to Bective, there is a triangular piece of ground on which there is a siding with a turn-table. The public road crosses the line by a bridge, and this road, which forms one of the sides of the piece of ground, ascends to the top of the bridge, and along this side there have been formed a clay bank and hedge of thorns. The entrance, and I may say the legitimate entrance, to this piece of ground was by a wooden gate from the road, which was kept locked; and inside the gate there was a notice-board warning trespassers from entering. On the opposite side of the piece of ground, there ran a ditch and wire fence. The turn-table had been placed on the siding some two years before the accident, and the ground had been previously used by the defendants for storing timber, and there was evidence that children used occasionally come in and play see-saw on this timber; and since the erection of the turn-table they used occasionally come in and play at the turn-table, having a jaunt on it by making it revolve.

The hedge along the road to the bridge had got out of repair, and there was at least one gap in it, through which a child or even an adult could get and descend by a slope to the piece of ground; and there appears to have been a worn path. There was no difficulty in children—at all events children a little older than the plaintiff—climbing over the gate, and so getting into the ground; and they occasionally did so. A witness, examined for the plaintiff, stated that when he saw children playing there he hunted them away as being trespassers. On the day on which the accident occurred, Sunday, the 18th June, 1905, the plaintiff went from Navan, accompanied by his sister, who was much older than he, to see their grandmother, who lived not far from the line, and the plaintiff was left by her, while she went on. The plaintiff was in the company of two boys named Monahan. The plaintiff and Charlie Monahan went through the hedge, and reached the turn-table. The elder Monahan crossed the gate into the ground. The plaintiff was put on the turn-table, and it was set in motion to give the desired jaunt, when the plaintiff's

leg was crushed between the table and the wall; Monahan said it was set in motion by three stronger boys. The turn-table was kept in position by a bolt easily moved; but it required considerable force to make it revolve.

The obligation of the defendants in reference to the fence is created by section 50 of the Railways Clauses Act, 1845, which provides that "every bridge erected for carrying any road over the railway shall be built in conformity with the following regulations. There shall be a good and sufficient fence on each side of the bridge, of not less than 4 feet, and on each side of the immediate approaches of such bridge, of not less than 3 feet."

The Lord Chief Justice left to the jury four questions—(1) Was the fence in a defective condition? (2) If so, was it through the negligence of the defendants? The jury answered both these questions in favour of the plaintiff; and the case must proceed on the result of their finding. Question (3) was—Was the boy allured through the hedge and up to the turn-table by the negligence of the defendants? *Answer*—Yes. (4) Was it by reason of the negligence of the defendants, and as the effective cause of it, that the misfortune occurred? *Answer*—Yes.

I see no evidence of "allurement," as it was termed, on the part of the defendants of this child into the Company's premises, no more than the possession of an orchard or flower-bed inside the road-fence might be called an allurement. The trespass would be more likely to occur if trespassing suggested amusement or profit; but, in my opinion, invitation and allurement may be left out of the case, and it must be dealt with on the answer to the fourth question, whether the omission to keep the fence repaired and the misfortune can be connected, so as to make the first the effective cause of the latter.

In my opinion, there is a want of connexion between the non-repair of the fence and the injury, both as regards the injury itself and the reaching to the turn-table by the child. It is true the child chose the break in the hedge as the mode of access to the plot; but this act of volition by him would have been equally effective for reaching the turn-table if he had climbed over the gate, as Patrick Monahan did; and it is impossible to contend that

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if Patrick Monahan had been injured he would have had a cause of action by reason of the defective condition of the fence. They both intended to go to the turn-table, and chose their mode of access, and the act which caused the injury was, as it seems to me, one independent of the fence, subsequent in point of time, and entirely different in its object, viz. the mounting on the turn-table.

I think both children entered voluntarily, and were and continued trespassers. How can the mode of entry give the plaintiff a cause of action? I can conceive that if he had been run over by an engine of defendants, running on this plot, he might be assimilated to the case of an animal that had been thus allowed to stray on the plot. But here there is required another act of negligence to give a cause of action. It cannot be negligence in defendants to have a turn-table for the purposes of their traffic. It was not intended as a plaything for children; and it never could be otherwise than dangerous if abnormally used. Take the case of the timber which, in former times, had been placed on this plot: if children trespassed and erected a see-saw, were the defendants responsible if a child fell, or, as was said in argument, if he climbed a tree, and fell off a rotten branch? The turn-table was perfectly safe till wrongfully put in motion by the boys. I think the child was from the first a trespasser. They had not been always turned off, and it must be assumed that the defendants knew there was a likelihood of trespass occurring; but I do not think he ever occupied the position of a licensee: and if he were a licensee, I cannot think the turn-table ever was a concealed danger. If the defendants had an engine on the ground, it too might easily be turned by boys into a dangerous thing to themselves. Negligence implies some omission of duty, or breach of duty, and I cannot see where the duty arose towards those boys when they trespassed on this plot, voluntarily, for their own amusement. I do not think there was any omission as regards the construction of the turn-table for its normal use; and I cannot see any duty to make it a safe plaything.

No authority has been cited which goes the length of giving a cause of action in such a case as the present. In *Lynch* v. *Nurdin* (1) the cart was left on the highway—a nuisance, and

(1) 1 Q. B. 29.

the defendants who left it there were held responsible by reason of the act of the boy who caused it to be moved—an event which the person who left it on the street should have reasonably contemplated. It was on *Lynch* v. *Nurdin* (1) that Mr. Bourke, in reply, rested his case; but I do not think there is any analogy between this turn-table on private property as regards a trespassing child, and the cart on the public street—a nuisance.

Hughes v. *MacFie* (2) and *Mangan* v. *Atterton* (3) are much stronger cases than the present, as the injuries in both these occurred on public streets. It would be a strong measure for us in a case like this to overrule them on the strength of the observations of Cockburn, C.J., in *Clark* v. *Chambers* (4).

Upon the whole it appears to me there is a complete break in the train of causation between the omission to repair the fence and the accident at the turn-table, and that the case is the same as if Patrick Monahan, who climbed over the gate, were the plaintiff. I think it would be dangerously extending the liability of railway companies and other owners of property if we were to hold that this verdict can be upheld.

I think the appeal must be allowed, and the action dismissed.

FITZGIBBON, L.J. :—

Concurring, as I do, with the Lord Chancellor and also with Holmes, L.J., I feel scarcely at liberty to add anything. But this is an important case, and without going over the facts, I deal with the principles on which I find it impossible to sustain the action.

Two distinct grounds of liability have been relied upon against the Company. The first was the defective condition of the fence, regarded as the cause of the injury. It was, no doubt, the duty of the Company to keep the fence in repair. The second was that mentioned in the question put to the jury—viz., permitting the gap *whereby the child was allowed* to get into the place where it was injured. In this view of the case, the defective condition of the fence is regarded merely as evidence that the child was allowed to get upon the land of the defendants by their default.

(1) 1 Q. B. 29.
(2) 2 H. & C. 744.
(3) L. R. 1 Ex. 239.
(4) 3 Q. B. D. 327.

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Fitz Gibbon, L. J.

As to the defective condition of the fence, the plaintiff's case appears to me to fail on two grounds. First, I can find no relation of cause and of effect between the defective condition of the fence and the injury. The Lord Chancellor has shown how completely the chain of causation is broken. Unless we hold that the child would not have got in at all, if there had not been a gap in the fence, the plaintiff's case fails. It is not even proved that the child got through the gap, but it is contrary to all the probabilities that, if there had been no gap, he would not have got in. He could, and probably would, have got in, as another boy did, through the bars of the gate, or by some other way, as the others did. At most, the gap in the fence only facilitated his getting into the Company's premises, and his becoming a trespasser; but assuming that it was negligence to leave the fence in a condition which let the child come through it, what was the measure of liability of the Company for so leaving it? Here there is a second breach in the chain of causation. It appears to me that when the child got through the fence, which the defendants were liable to maintain, they became liable, at most, only for the same injury which would have been likely to be caused to a trespassing animal, but not for an injury caused by the act of a third party, or for an injury arising from the fact of trespass. If a sheep had wandered in through this gap, could the Company have been liable, if a boy had thrown a stone at it? What occurred afterwards did not arise from the child's having gone through the gap. On the contrary, he got through the gap, because he wanted to go, or was brought for the purpose of going, to the turn-table; and when he got there he was injured, not by the negligence of the Company, but by the act of the boy Monahan in putting him on the turn-table, and setting the turn-table in motion. The neglect of the Company was neither the *causa causans* nor the *causa sine qua non*. The injury was caused, not by the Company, but by the children.

There was no concealed danger. The turn-table was lawfully where it was, and it was an ordinary one. The fact that it was a turn-table on which children could ride, was no *enticement* to ride on it. Whenever children had been seen there, they were hunted out. It would be unreasonable to require the Company to have

men always present to prevent trespassers from endangering themselves on the line; or to maintain impassable fences to keep trespassers out. There was no evidence of allurement, enticement, or allowance by the Company. The independent wrongful acts both of Monahan and of the other children, including the plaintiff, were none the less acts of trespassers, because they were the acts of boys or children. There was no evidence of negligence other than the existence of the gap in the hedge, and the omission to stop the gap can not, in my opinion, amount to allurement, inducement, or allowance, leading to the injury, nor can it make the maintenance of the turn-table an actionable wrong.

Lynch v. *Nurdin* (1) was the case of injury on a public highway, where a man left his horse and cart unattended in the street, and a probable danger resulted in actual injury.

In *McDowall* v. *Great Western Railway Co.* (2) the plaintiff was lawfully using a highway over a level crossing, and the injury was caused by the act of other persons for whom the Company were not liable.

In *Sullivan* v. *Creed* (3) the injured person was lawfully within range of a loaded gun negligently left in a dangerous place, and because it was likely that it would be used, as it was used, so as to do the injury, the person who left it there was held liable. That is not like the present case.

HOLMES, L.J.:—

This action has been brought to recover damages for an injury to the plaintiff's leg, which rendered amputation necessary; and, as the defendant Company called no witnesses, the question to be decided is whether the evidence given on behalf of the plaintiff failed to show a good cause of action. If it was such as would justify a verdict for the plaintiff, the judgment given by the Lord Chief Justice must stand, irrespective of the particular issues left to and found by the jury. The scene of the occurrence was the defendants' station at Navan, which is situated about a quarter of a mile from the nearest part of the town on the highway leading to Trim. Just before the station is reached, this road is carried

(1) 1 Q. B. 29. (2) [1903] 2 K. B. 331. (3) [1904] 2 I. R. 317.

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over a bridge 24 feet above the rails. Approaching the bridge there is an ascent in the road, which there adjoins a triangular piece of ground, part of the Company's premises. Formerly this land seems to have been used as a place for depositing timber, and there is evidence that the grass growing on it was made into hay; but about two years before the accident it became the site of a siding and turn-table constructed by the Company in connexion with their line. There was an entrance to it, where it was level with the highway, by a gate always kept locked; and as the road ascended towards the bridge the fence consisted of a bank and hedge which were not in good repair. There was ample evidence to show that at one place there was an opening through which an adult could pass, and a more or less defined path therefrom down to the land on which the turn-table stood, and there were probably other places in the hedge through which a child could make his way. The evidence of what led to the accident is confined to that of the plaintiff, whose age at the time was only four years and two months, and of another boy nine and a-half years old, named Patrick Monahan. Neither of them can be considered a satisfactory witness; but whatever doubt there may be regarding some unimportant incidents, the material facts are sufficiently clear. The plaintiff is one of a large family, and on the day of the occurrence his parents were absent in Dublin. Their house is about three-quarters of a mile from the defendants' station, and as none of the children who were at home other than the plaintiff were examined, it does not appear how so young a child found his way to a place at such a distance from his residence. It is suggested that he was brought by a sister as far as his grandmother's, but when there he would still be more than a quarter of a mile from the turn-table. However this may be, he met at some place on the road the boy Patrick Monahan, already mentioned, and Charles Monahan, his brother. Patrick asked the plaintiff to go with them to get a jaunt; and accordingly the three went to the fence separating the highway from the triangular piece of ground. Patrick Monahan says that he climbed the gate, and that the other two came through the hedge. It is, I think, immaterial whether the plaintiff passed through the opening and down the path to which I have referred,

or gained an entrance through some other defective portion of the fence. In either case he would have been given the means of access by the neglect of the defendants in the performance of their statutory duty to maintain a good and sufficient fence 3 feet high on each side of the immediate approaches to the bridge. Having thus reached the railway premises, he went towards the turn-table with the two Monahans, who put him on it. The table was then set in motion either by the Monahans or by bigger boys, with the result that the plaintiff's leg was crushed. The only other evidence to which I think it necessary to refer is that of two witnesses who say that they very often saw children playing on this triangular piece of ground, that before the siding was made they used the timber that was lying on it to make what was called a see-saw, and that latterly they played with and on the turn-table. The jury were at liberty to infer, and I assume, that the railway officials were aware of these practices, and took no steps to put an end to them. There was considerable controversy at the trial as to the construction of the turn-table, and the mode in which it was kept in position. The plaintiff's counsel were anxious to show that it was of an imperfect type, and that the accident might not have happened if it had been differently constructed.

Now, I think it unnecessary to refer to this evidence. While the turn-table seems to have been sufficient for the requirements of the defendants, I have no doubt that it was not a safe plaything for children; nor do I think that any of the suggested improvements would fit it for a purpose for which it was never intended.

In the foregoing summary I have omitted none of the evidence that seems to me material; and I now proceed to consider whether it sustains the cause of action. The argument of the plaintiff's counsel, like the judgment of Palles, C.B., treats the failure of the Company in the performance of their statutory duty to keep up the fence as the ground of their liability. There is no doubt that this duty was imposed for the protection of the public; but it would be absurd to hold that the intention of the legislation was to protect members of the public who would take advantage of the Company's default for the purpose of wilfully trespassing on their premises. No kind of fence of the height

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prescribed by the statute would present an effective obstacle to an active man or boy who was desirous of crossing it, and, whether a person voluntarily entering on another's land is a trespasser or not, cannot depend upon the mode of entrance. Passing over for the present such matters as invitation, allurement, and hidden trap, I can find no authority for holding that a man, meeting with an accident on land on which he is trespassing, is given a right of action, for the damage he has suffered, against the landowner, by the mere fact that a breach of duty on the part of the latter has enabled him to trespass. I am prepared for my present purpose to confine this proposition to cases where there is no further act on the part of the landowner causing the accident. I doubt if the law in all cases requires this limitation; but it may be that where a child, too young to realize danger, obtains access to a railway, as the plaintiff did, and, when wandering about, is injured by a passing train or by the Company's servants in carrying out the ordinary business of the line, the Company would be liable even in the absence of any further negligence on their part. But that would be a different case from the present. The plaintiff, entering the railway premises by an act of volition, reached the ground and continued in safety until the turn-table was set in motion, after he had been placed on it by Monahan. The accident was not caused by the use of the premises as a railway, but by the independent action of the plaintiff himself and of third parties. Therefore, unless it can be shown that the Company contributed to what happened in some other way than by allowing the fence to be defective, they are not liable. They would not have been liable if Monahan himself had been the sufferer; and the only distinction between him and the plaintiff is the difference of age. But on this point *Mangan* v. *Atterton* (1) and *Hughes* v. *MacFie* (2) seem to me to be much stronger cases against the defendants, for in them the scene of the accidents was not private property, but the public highway, and yet the plaintiffs failed. Notwithstanding the observations of Cockburn, C.J., in *Clark* v. *Chambers* (3), these cases have not been overruled, and I am not prepared to overrule them. It was, I think, a consciousness of the weakness

(1) L. R. 1 Ex. 239. (2) 2 H. & C. 744. (3) 3 Q. B. D. 327.

of their first proposition that led the plaintiff's counsel to elaborate the second branch of the case, the object of which is to show some default on the part of the Company other than not repairing the fence. The foundation of this argument is the evidence that children were in the habit of playing on this piece of ground, before and after the construction of the siding, and that, therefore, they are to be regarded as licensees.

It is, in my opinion, a novel doctrine that a trespasser on property is converted into a licensee by the mere fact that the owner has not turned him off when he was committing similar acts of trespass. But even if this circumstance could be offered as evidence of leave and license in an action of trespass, does any right or liability spring from such a license? We are familiar with cases in which the license is given and used for the convenience and benefit of both parties, as where a person enters premises in the usual course of business or where there is an express or implied invitation. In such cases the licensee may be entitled to have reasonable care taken for his safety. But it would be an unwarrantable extension of this doctrine, if it were made to apply to persons who wantonly or voluntarily go on another's property for their own amusement or to gratify idle curiosity. The logical consequences of doing so would be often startling. The owner of flower-beds or an orchard may know that people often enter his property to pluck a flower, or get an apple; but does this knowledge impose on him the duty of using care that while so engaged they will meet with no accident, that a well on the land is duly fenced, or that a rung of the ladder by which the apples are reached is not rotten? I confess I do not understand the doctrine of allurement in a case like this. The triangular piece of ground was a proper site for a siding and a turn-table. There is nothing particularly attractive in these usual incidents of a railway station, and they are quite harmless when engines are not passing over them. It is the duty of the Company to take such care in their construction as that they can be so used without danger to their servants or to others engaged in lawful business; but beyond this I am of opinion that their liability does not go. It was not argued in this Court, nor do I think it could have been, that there was a concealed

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danger in the turn-table like hidden dykes, or spring-guns in fields over which a person is walking, as a licensee or otherwise. There is no reason to think that the turn-table was not reasonably well suited for its ordinary use, although, as I have already said, it might have been differently constructed if it had been intended for a plaything.

The plaintiff's counsel in fact rested their case on three authorities: *Lynch* v. *Nurdin* (1), *McDowall* v. *The Great Western Railway Co.* (2) and *Sullivan* v. *Creed* (3). The first of these was once doubted; but it is said to be now accepted as good law, nor do I question this. It is, however, a different case, for in it the accident arose from the defendant having left his cart as a nuisance on a public highway; and I am of opinion that it has no application to an accident arising from the combined action of the plaintiff and other wrongdoers in relation to a machine lawfully erected on private property. *McDowall's Case* (2) might be in point one way or other, if the plaintiff had been one of the children who had received an injury from their combined act; but the plaintiff therein was a stranger who at the time of the accident was lawfully using a level crossing. *Sullivan* v. *Creed* (3) turned upon leaving a loaded gun in a place where persons were passing and re-passing—an act always looked on as supremely negligent. I cannot regard any of these cases as supporting the plaintiff; and I am of opinion that the defendant is entitled to judgment.

Solicitors for the plaintiff: *Dealy & White.*
Solicitor for the defendants: *Kilkelly.*

R. ST. J. C.

(1) 1 Q. B. 35. (2) [1903] 2 K. B. 331. (3) [1905] 2 I. R. 317.

THE KING (DE VESCI) *v.* THE JUSTICES OF QUEEN'S COUNTY (1).

K. B. Div. 1907. Nov. 29. Dec. 17–19. 1908. Jan. 22.

Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 162—*Order of Justices authorizing entry on lands to take road materials—Decision of Justices that the lands are not an orchard not conclusive*—Certiorari—*"Orcharding out"—Signature of order—Justices—Bias.*

It is a condition precedent to the jurisdiction of Justices to make an order under sect. 162 of the Grand Jury (Ireland) Act, 1836, authorizing entry on lands to take road materials, that the lands are not an orchard; and their decision that it is not an orchard may be challenged on *certiorari*, not merely on the ground that there was no evidence to support it, but also with reference to the weight of evidence.

There is no jurisdiction to make an order under the section where the lands are, in fact, an orchard, even though the owner may have turned them into an orchard for the purpose of ousting the jurisdiction of the Justices, at least where this has been done before a Justice's order has been made or sought for.

Per Gibson, J.: An order made under the section should be signed by all the Justices who made it.

The chairman of a County Council and another member of the Council who had taken an active part in promoting and carrying a resolution of the County Council, that their county surveyor should apply at Petty Sessions for an order authorizing him to enter certain lands and take road materials, were Justices of the county, and took part with the other Justices at Petty Sessions in adjudicating on an application made by the county surveyor, pursuant to such resolution, notwithstanding objection made on behalf of the owner of the lands, who opposed the application on the ground that the lands were an orchard, and also on the ground that the road materials could be conveniently procured elsewhere. The application was granted, and an order made accordingly:—

Held, that the order must be quashed on the ground of bias.

CERTIORARI.

The prosecutor, the fifth Viscount de Vesci, was the owner of lands adjoining the town of Abbeyleix in Queen's County, on which there was a gravel pit, known as "Jelly's Pit." The prosecutor's predecessor in title, the fourth Viscount de Vesci,

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, J.

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having been of opinion that the further working of the pit on its western side would be undesirable, planted, in the year 1903, a fringe of two or three rows of apple trees on the land adjoining the west side of the pit, for the purpose of forming an orchard. The trees were planted up to the brow of the pit, and covered over half an acre. The fourth Lord de Vesci died on the 6th July, 1903, and between the date of his death and the beginning of the year 1905, over 500 additional apple trees were planted by the prosecutor on an area covering two and a-half acres, at a cost of about £40. It was alleged in an affidavit made by Mr. Fitz-Herbert, who was the prosecutor's agent, and had also been agent to the fourth Viscount de Vesci, that since such planting the place had been maintained as a genuine and *bonâ fide* orchard under the management of Lord de Vesci's gardener.

In the year 1906 the county surveyor of Queen's County entered into an agreement with the prosecutor for the supply of stones for the repair of roads in the neighbourhood of Abbeyleix, to be paid for at so much a ton. These stones were not taken from Jelly's Pit, but from other pits at some little distance.

On the 18th December, 1906, the Rural District Council of Abbeyleix passed a resolution requesting the County Council "to instruct their surveyor to take the necessary steps to enter and remove from Jelly's Pit such materials as might be required for the repair of the roads in the locality, notwithstanding any opinion that might be given by the solicitor to the County Council." Mr. Arthur MacMahon, J.P., who was the Chairman of the Rural District Council, and presided on the occasion, stated that he would do what he could in support of the resolution. On the 14th January, 1907, the County Council of the Queen's County passed a resolution, "That if the alternative pits offered by the owner are unsuitable, the county surveyor is hereby directed to seek an order from the magistrates to enter Jelly's Pit, for such materials he may require for the repairs of the roads in the locality." On the 27th April, 1907, the county surveyor wrote to Mr. Fitz Herbert enclosing a copy of the resolution of the 14th January, and inquiring on what terms Lord de Vesci would supply road materials. Some further correspondence passed between the county surveyor and Mr. Fitz Herbert, but

no terms were agreed to. On the 12th June, 1907, the County Council, on the motion of Mr. Arthur Mac Mahon, passed a resolution, "That the resolution of the 14th January last, with reference to the obtaining materials for the repair of roads at Abbeyleix, be rescinded, and that the county surveyor proceed at once to obtain an order from the magistrates to enter Jelly's Pit."

A summons was issued on the 2nd July, 1907, on the complaint of the county surveyor, and served on Lord de Vesci, requiring him to show cause why an order should not be made authorizing the complainant to enter on the lands of Knocknane, known as Jelly's Pit, and take road materials as therein mentioned. The summons was heard at Abbeyleix Petty Sessions, on the 6th July, 1907. There were seven magistrates on the Bench, including Mr. Arthur Mac Mahon and a Mr. James Mac Mahon, also a member of the Abbeyleix Rural District Council, and Mr. Patrick A. Meehan, Chairman of the County Council. When the case was called on, Mr. Arthur Mac Mahon and Mr. James Mac Mahon left the Bench, and the case was heard by the remaining magistrates. Objection was made by Lord de Vesci's solicitor that the magistrates had no jurisdiction to make the order sought, as the lands in question were a *bonâ fide* orchard. Mr. Fitz Herbert and Lord de Vesci's head gardener were examined in support of this contention, and deposed to the facts above mentioned as to the planting of the orchard. Mr. Fitz Herbert admitted on cross-examination that the orchard had been originally planted for the purpose of preventing further quarrying in Jelly's Pit, but stated that, since then, the entire area of about 2½ acres had been maintained as a genuine orchard. The evidence of these witnesses was not contradicted. An order was made by the magistrates (Mr. Meehan dissenting) to the following effect:—"No jurisdiction; application being proved to the Justices' satisfaction to apply for entry into a *bonâ fide* orchard."

On the 8th July, 1907, a meeting of the County Council was held, presided over by Mr. Arthur Mac Mahon, at which a letter was read from the solicitor of the County Council referring to the decision of the magistrates as a most unfortunate one, and advising the County Council to apply for a similar order at next Abbeyleix Petty Sessions [see this letter set out in the judgment

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of Lord O'Brien, L.C.J., *post*, pp. 295, 296]. The following resolution was then passed :—"That, acting on the advice of our solicitor, we hereby direct our county surveyor to again apply to the magistrates at Abbeyleix Petty Sessions for an order to enter Jelly's Pit for road materials."

Pursuant to this resolution a new summons was issued on the 3rd October, 1907, on the complaint of the county surveyor, and served on Lord de Vesci, requiring him to show cause why an order should not be granted authorizing the complainant to enter the lands of Knocknane, and to take road materials as therein mentioned. This summons came on for hearing at Abbeyleix Petty Sessions on the 26th October, 1907, before a Bench of seven magistrates, including Mr. Arthur Mac Mahon and Mr. Patrick A. Meehan; Lord de Vesci's solicitor raised the following preliminary objections:—(*a*) That the subject-matter of the summons was identical with that of the summons dealt with by the order of the 6th July, 1907, and was already decided, and that the Court and the county surveyor were estopped by the said order from re-opening the matter; (*b*) That the said Arthur Mac Mahon, J.P., should not adjudicate upon the said summons, and that he should leave the Bench, upon the ground of bias, inasmuch as he had taken an active part in promoting the proceedings which the County Council of which he was a member had directed to be instituted, and in which the real prosecutors were the members of the said County Council. The Resident Magistrate and another magistrate being of opinion that they were estopped by the order of the 6th July, 1907, refused to adjudicate, and left the Bench. Mr. Meehan then took the place of chairman vacated by the Resident Magistrate. Lord de Vesci's solicitor objected to Mr. Meehan taking the chair, on the ground of bias, and renewed his objection that the order of the 6th July operated as an estoppel. Both Mr. Mac Mahon and Mr. Meehan assisted in adjudicating. Mr. Mac Mahon stated that he had reconsidered the matter since the 6th July, when he had withdrawn from the Bench. Mr. Meehan announced that the magistrates present had decided to hear the case unless Mr. Fitz-Herbert, on behalf of Lord de Vesci, would undertake to open a pit on lands in Lord de Vesci's occupation, and provide materials to the county surveyor's satisfaction. Mr. Fitz Herbert was

unable to give this undertaking. The case was then heard. Witnesses were examined on behalf of the complainant to prove that road materials could not be conveniently procured elsewhere than in Jelly's Pit. It was alleged in Mr. Fitz Herbert's affidavit —but this was contradicted in the affidavit of the county surveyor hereinafter referred to—that no evidence was given by these witnesses to show that the lands in question were not an orchard. Mr. Fitz Herbert and Lord de Vesci's head gardener were examined on behalf of Lord de Vesci, and repeated the evidence given by them on the former hearing. The magistrates made the following order:—"That the plantation at Jelly's Pit is not an orchard; and, on hearing the evidence, the Bench are unanimously of opinion that this application to enter Jelly's Gravel-Pit should be granted. Order accordingly." This order was signed only by Mr. Patrick A. Meehan.

Lord de Vesci obtained a conditional order for a writ of *certiorari* to bring up for the purpose of being quashed the order of the 26th October, 1907, on the following grounds, *inter alia*:—That the subject-matter thereof was *res judicata*, having regard to the order of 6th July, 1907; that the order of the 6th July estopped the complainant from proceeding with the summons of the 3rd October, and the magistrates from adjudicating thereon. That upon the evidence the land in question was an orchard; and that, by an erroneous finding that it was not an orchard, it was not competent for the magistrates to confer jurisdiction upon themselves to deal with the summons of the 3rd October, 1907. That two of the adjudicating magistrates, namely, Patrick A. Meehan and Arthur MacMahon, were biassed and interested, and should not have adjudicated upon the summons of the 3rd October, 1907.

An affidavit was made by Mr. Arthur MacMahon, and filed by way of cause against making the conditional order absolute, in which he stated that, in adjudicating on the hearing on the 26th October, he was in no way biassed or prejudiced in favour of the applicant, or against Lord de Vesci; and that he had no pecuniary or other interest in the subject-matter of the application, except in so far as he was a ratepayer; and that he adjudicated on the application solely on the law and merits of the case and the evidence

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adduced. An affidavit of a similar nature was made by Mr. Patrick A. Meehan. It was alleged in a further affidavit by Mr. MacMahon that the apple-trees did not bear.

An affidavit was made by Mr. Henry Vincent White, the county surveyor, in which he alleged that the planting of the apple-trees was for the express and exclusive purpose of trying to prevent road contractors from obtaining liberty to enter and take road materials from the pit under statutory authority, as the apple-trees were planted on the only two sides of the pit from which road materials could be procured. He further alleged that in the present condition of the lands there was no *bonâ fide* orchard whatever on them. That the so-called orchard was entirely unprotected by any wall or fence sufficient for the protection of an orchard, and was intersected by paths made by foot-passengers using the lands as a short cut.

Mr. Fitz Herbert, in an answering affidavit, stated that the orchard was securely fenced all round by thorn quick-hedges and barbed wire, save on the side of the pit. He denied that the public were allowed to walk freely through the orchard, and stated that, so far as he was aware, it was only recently that attempts had been made to make paths through the orchard. He further stated that Lord de Vesci's gardener in his evidence swore that the trees could not be expected to bear until they were older.

The present application was to make the conditional order absolute.

It was admitted in the course of the argument that the lands from which the road materials were sought to be taken were not Jelly's Pit proper, which was worked out, but a lateral extension into the adjoining land alleged by the prosecutor to be an orchard.

Battersby, K.C. (with him *W. G. Gibson*), for the prosecutor :

We contend that the order of the 26th October, 1907, should be quashed on the following grounds :—

1. The order of the 6th July, 1907, declaring the land in question to be an orchard, operated as an estoppel, and precluded the magistrates from going into the matter on the hearing of the

second summons: *Duchess of Kingston's Case* (1); *Routledge* v. *Hislop* (2); *Poyser* v. *Minors* (3); *Flitters* v. *Allfrey* (4); *Hume* v. *Burton* (5); *Wakefield Corporation* v. *Cooke* (6); *Irish Land Commission* v. *Ryan* (7); *The Queen* v. *Farmer* (8); *The Queen* v. *Glynne* (9). In *The Queen* v. *Harrington* (10) it was laid down that had the first decision been on the merits it would have been conclusive. In *The Queen* v. *Gaunt* (11) the first decision was obtained by perjury, otherwise it would have been conclusive: *The Queen* v. *Glynn* (9), *per* Blackburn, J. (p. 22).

2. Even assuming the order of the 6th July not to have operated as an estoppel, we contend that the evidence shows that the place in question was an orchard, and the magistrates, therefore, had no jurisdiction to make an order to enter. The fact that the land was turned into an orchard for the purpose of ousting the jurisdiction of the magistrates to make an order is immaterial if the lands are in fact an orchard: *The King* (*Holmes*) v. *The Justices of King's County* (12); *The King* (*Coyle*) v. *The Justices of Monaghan* (13); *The Queen* v. *Farmer* (14). The decision of the magistrates that the place is not an orchard is not conclusive. If, in fact, it is an orchard, they have no jurisdiction to make an order; and they cannot give themselves jurisdiction by erroneously declaring that it is not an orchard. Their decision on this point can be reviewed on *certiorari*: *The King* (*Holmes*) v. *The Justices of King's County* (12).

3. Two of the magistrates, Mr. Arthur Mac Mahon and Mr. Patrick A. Meehan, who adjudicated in making the order of the 26th October, were interested in the subject-matter, being members of the County Council, and having taken—at all events Mr. Mac Mahon had taken—an active part in promoting the application by the county surveyor. This was sufficient to disqualify them from adjudicating; and the order is therefore bad on the ground

(1) 2 Sm. L. C. (11th ed.), p. 731.
(2) 2 E. & E. 549.
(3) 7 Q. B. D. 329.
(4) L. R. 10 C. P. 29.
(5) 1 Ridgeway P. C. 247.
(6) [1904] A. C. 31.
(7) [1900] 2 I. R. 565.
(8) [1892] 1 Q. B. 637.
(9) L. R. 7 Q. B. 16.
(10) 28 J. P. 485.
(11) L. R. 2 Q. B. 466.
(12) 4 New Ir. Jur. 22.
(13) [1908] 2 I. R. 1.
(14) [1892] 1 Q. B. at p. 639.

of bias: *R.* v. *Allan* (1); *The Queen* v. *Milledge* (2); *R.* (*Poe*) v. *The Justices of Cork* (3); *Leeson* v. *General Council of Medical Education* (4); *The Queen* v. *London County Council* (*Ex parte Akkersdyk*) (5); *The Queen* v. *Gaisford* (6); *The Queen* v. *Henley* (7); *The Queen* v. *The Justices of Cork* (8); *The Queen* v. *Fraser* (9).

Clancy, K.C., for Arthur Mac Mahon and Patrick A. Meehan.

Healy, K.C. (with him *D. J O'Brien*), for the County Council of Queen's County:—

The order of the 6th July did not operate as an estoppel: *Wakefield Corporation* v. *Cooke* (10); *The Queen* v. *Grant* (11); Taylor on Evidence (10th ed.), p. 1201; *Rex* (*Farrell*) v. *Justices of Queen's County* (12). Is it to be said that a Justice has power to make an order declaring a place not an orchard, which will act as a judgment *in rem* and bind all persons for all time?

The magistrates had jurisdiction to enter on the inquiry as to whether the place was an orchard or not, and their decision on the point is therefore final and conclusive: Paley on Summary Conviction (8th ed.), pp. 468, 469; *The Queen* v. *Bolton* (13); *Thompson* v. *Ingham* (14); *Brittain* v. *Kinnaird* (15). In any event the evidence shows that this was not a *bonâ fide* orchard. The planting of the apple trees was a mere device to prevent an order to enter the lands being obtained.

There was no such interest in either Mr. Mac Mahon or Mr. Meehan as would justify setting aside the order on the ground of bias, even if an order under the section in question was a judicial act: *The King* v. *The Justices of Sunderland* (16); *The King* v. *Tempest* (17); *The Queen* v. *The Justices of Bradford* (18); *The*

(1) 4 B. & S. 915.
(2) 4 Q. B. D. 332.
(3) 40 I. L. T. R. 121.
(4) 43 Ch. D. 366.
(5) [1892] 1 Q. B. 190.
(6) *Ibid.* 381.
(7) *Ibid.* 504.
(8) 7 Ir. C. L. R. 244.
(9) 9 T. L. R. 613.
(10) [1904] A. C. 31.
(11) 19 L. J., M. C. 59.
(12) 5 New Ir. Jur. Rep. 116.
(13) 1 Q. B. 66.
(14) 14 Q. B. 710, 718.
(15) 1 Br. & B. 432.
(16) [1901] 2 K. B. 357.
(17) 66 J. P. 472.
(18) 30 J. P. 131.

King (*Drohan*) v. *Justices of Waterford* (1); *The Queen* v. *The Justices of County Dublin* (2); *The Queen* v. *The Justices of Huntingdon* (3); *The Queen* v. *Handsley* (4). Moreover, the ordinary rules as to bias do not apply to applications under sect. 162 of the Grand Jury (Ireland) Act. Where the necessary conditions exist the Justices are bound to make the order; mandamus would lie if they refused.

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W. G. Gibson, in reply:—

An order of the Justices under sect. 162 is a judicial act, and the ordinary rules as to bias apply. As to what is a judicial act see *The Queen* v. *Corporation of Dublin* (5), *per* May, C.J., at p. 377; *The King* (*Quinnell*) v. *Kerry County Council* (6), *per* Palles, C.B., at pp. 303, 304; *Leeson* v. *General Council of Medical Education and Registration* (7), *per* Bowen, L.J., at p. 383. [He also referred to *The Queen* v. *Huntsworth* (8); *The Queen* v. *Hodgson* (9).]

Cur. adv. vult.

1908. Jan. 22.

LORD O'BRIEN, L.C.J.:—

On the application of Mr. White, county surveyor of the Queen's County, an order was made on the 26th October last, authorizing him to dig for and remove gravel from a certain place called Jelly's Pit, for the repair of certain roads in that county. Lord de Vesci, to whom the so-called pit belongs, seeks to impeach the order so made on many grounds. First, because, as he alleges, the magistrates who made it were biassed; secondly, because, as he alleges, they had no jurisdiction to make it, the place being, as he asserts, an orchard; and, thirdly, because an application for a similar order had been made before and refused; and that, therefore, the matter was *res judicata*, and could not be gone into again; that the applicant was, in fact, estopped by the previous refusal to grant an order. It will, I think, be sufficient to deal with the two first grounds of impeachment. In *Holmes' Case* (10) I held that,

(1) [1901] 2 I. R. 548.
(2) [1894] 2 I. R. 527.
(3) 4 Q. B. D. 522.
(4) 8 Q. B. D. 383.
(5) 2 L. R. Ir. 371.
(6) [1905] 2 I. R. 299.
(7) 43 Ch. D. 366.
(8) 13 W. R. 7.
(9) 28 J. P. 484.
(10) 4 New Ir. Jur. 22.

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having regard to the form of the previous order, there was no estoppel, even if the doctrine of estoppel was at all applicable in such a case. However, I will now apply myself to the two first grounds I have mentioned. Were there two of the adjudicating magistrates, Messrs. Arthur MacMahon and P. A. Meehan, "biassed" within the legal meaning of that term? "Bias" does not necessarily mean a corrupt state of mind. I do not wish to impute any such condition of mind to these gentlemen. In my opinion, there is no ground for the imputation of corrupt motive or conscious bias. Indeed, corrupt motive and conscious bias are much akin —are practically identical. It is not necessary for us, in order to warrant us in quashing the order impugned, to ascertain —to determine—whether "bias" existed in point of fact. If it was essential directly to determine its existence as a matter of fact, the action of the Court would, indeed, be difficult. In fact, the jurisdiction of the Court would be practically a dead letter. We rarely, if ever, could ascertain the actual condition at a given moment of the human mind. All we are concerned with in such a case as the one now before us is, whether there was, at the outset of the inquiry, a real likelihood of bias; whether, under all the circumstances, there were reasonable grounds for believing that any one of the adjudicating magistrates would be, even unconsciously to himself, influenced by bias. By "bias" I understand a real likelihood of an operative prejudice, whether conscious or unconscious.

What then are the facts leading up, and in relation, to the impugned order of the 26th October last? and what in particular was the connexion of Mr. Arthur MacMahon and Mr. Meehan with these facts and that order? The former was the chairman of the Rural District Council of Abbeyleix, and the latter was chairman of the County Council of the Queen's County. In 1906, Mr. Fitz Herbert, Lord de Vesci's agent, had agreed to supply road materials to the county surveyor, Mr. White, out of two pits other than the pit called Jelly's Pit. An objection was raised to these pits, and a resolution was passed on the 18th December, 1906, by the Rural District Council, to take the necessary steps to instruct the county surveyor to remove materials from Jelly's Pit. Mr. Arthur MacMahon, who was

the chairman of the Rural District Council, and presided on the occasion when the resolution was passed, stated he would do what he could in support of the resolution. The application came on to be heard on the 6th July following, and amongst the magistrates who sat to hear the application were Mr. Arthur Mac Mahon and Mr. Meehan. There were, I believe, some five magistrates in all, including two Resident Magistrates. Mr. Arthur MacMahon was objected to, and, yielding to the objection, he left the Bench. The remaining magistrates refused the application on the ground that the lands were an orchard, Mr. Meehan alone dissenting. I think Mr. Arthur MacMahon acted with obvious propriety in retiring from the Bench. He was a party to the resolution of the 18th December, and had promised to do all he could in support of it. When the case came to be discussed, it was opposed on the part of Lord de Vesci, on the ground, amongst others, that the place was an orchard. That he had made what was before not an orchard, a real, not a sham, orchard, in order to preserve the amenities of the place, by rendering such an application impossible. Many reasons were assigned why Lord de Vesci sought to prevent the extension of Jelly's Pit, and it was admitted that in order to give effect to these reasons, he resolved, if I may use the expression I used in other cases, to orchard out the county surveyor when making such application. A majority of the magistrates decided that the place was a *bonâ fide* genuine orchard, and dismissed the application. This was on the 6th July, 1907. Then came Mr. Turpin's letter of the same date—a very important document, and which, so far from assisting the case of Mr. Arthur MacMahon and Mr. Meehan, as has been asserted, makes, in my opinion, much against them. The letter is as follows:—

"MARYBOROUGH,

"*6th July*, 1907.

"*H. V. White* v. *Lord de Vesci.*

"DEAR SIR,—As you are aware, the application herein, to enter Jelly's Pit to obtain materials for repair of roads lying in the vicinity of the town of Abbeyleix, was this day refused by the magistrates sitting at Abbeyleix Petty Sessions, on the grounds that an orchard had been established on the verge of the gravel-pit in question, which Lord de Vesci's agent admitted had been planted for the express purpose of

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preventing the County Council, its surveyor and contractors, from obtaining materials from this gravel-pit for the repair of the county roads.

"I cannot help thinking that this decision was a most unfortunate one, inasmuch as there is no power to review the decision of the magistrates refusing such an order; whilst, on the contrary, had the order applied for been granted, there was nothing to prevent Lord de Vesci from having same reviewed by the King's Bench on *certiorari*.

"I do not know what the County Council's views on the subject may be; but my advice would be to apply for a similar order at next Abbeyleix Petty Sessions, as I do not consider that the decision to-day is any bar to making a fresh application.—Yours faithfully,

"H. TURPIN.

"JAS. CAREY, ESQ.,
"Sec. Queen's Co. Council,
"Maryborough."

This was a strong letter, asserting that the decision that day made was most unfortunate, and suggesting—stating—that the way to remedy the miscarriage was to get an order to authorize the county surveyor to take from Jelly's Pit gravel and sand for the repair of the roads—in fact, to reverse the order of the 6th July. This letter was submitted to the County Council; and on the 8th July a resolution was passed by the County Council to the effect that, acting on the advice of their solicitors, they thereby directed their county surveyor to again apply to the magistrates at Abbeyleix Petty Sessions for an order to enter Jelly's Pit for road materials.

A new summons was accordingly issued and served on Lord de Vesci, and came on to be heard on the 26th October, 1907. The magistrates were Mr. Hornibrook, R.M., Mr. Palmer, Mr. Arthur Mac Mahon (Chairman of the Rural District Council), Mr. Meehan (Chairman of the County Council), Mr. Walsh, Mr. Hume, and Dr. Walter Murphy. A preliminary objection was raised by the solicitor for Lord de Vesci, that the matter had already been disposed of by the former order of dismissal, and could not be again entertained. A majority of the Court, consisting, amongst others, of Mr. Meehan and Mr. Mac Mahon, over-ruled this objection. The Resident Magistrate and another magistrate present thought the objection good, and retired from the Bench.

Mr. Meehan then took the place of Mr. Hornibrook, who was Chairman. He was objected to on the ground of bias, and so was Mr. Mac Mahon.

These gentlemen, though objected to, continued to sit. Mr. Mac Mahon said he had reconsidered his position, and Mr. Meehan made, according to Mr. Fitz Herbert, the remarkable statement that the magistrates present had decided to hear the case unless Mr. Fitz Herbert, on the part of Viscount de Vesci, would undertake to open a pit in lands in Viscount de Vesci's occupation, and provide materials to the county surveyor's satisfaction. Mr. Fitz Herbert replied that he was unable to give an undertaking, but would endeavour to facilitate the county surveyor.

The language of Mr. Meehan is certainly significant. I think that language—the expression of determination to hear the case, unless a condition which Lord de Vesci was not legally bound to comply with was accepted—showed a very clear determination not only to hear the application, but to grant it. The magistrates that remained, including, as I have said, these two gentlemen, granted the order. The point was also made that the place was an orchard. The question was gone into at great length as to whether it was an orchard. The magistrates decided that it was not, to use their own language, a real, genuine orchard.

Firstly, then, were two of the adjudicating magistrates biassed? I think it is clear that they were. I think there was a real likelihood of bias—that there were reasonable grounds for believing they were biassed. There were reasonable grounds for believing that the urgent character of Mr. Turpin's letter was operating in the minds of these two gentlemen, and that these two gentlemen were there to give effect to the letter of their own solicitor. In fact, they were acting as judges in a case in which, after a survey and consideration of the particular facts, they directed proceedings to be taken. The county surveyor was their officer, and certainly, after the letter of the 6th July and the resolution of the 8th, he was acting on their behalf. The County Council had given a special direction in a particular case, after discussion of its peculiar facts, to institute in that particular case legal proceedings against a designated individual. Indeed, it would appear to me that the prohibition involved in the maxim, *Nemo debet esse judex in*

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suâ propria causâ, was disregarded. The case of *Leeson* v. *General Council of Medical Education and Registration* (1) is perhaps the most authoritative case on the subject. See what Lord Justice Bowen says, at pp. 384, 385. See also the dissentient judgment of Lord Justice Fry. In fact, the very ground which prevented the disqualification of the General Council in that case shows that, in this case, where such ground of exoneration does not exist, the magistrates here were disqualified. Lord Bowen, then Lord Justice Bowen, said (pages 384, 385): "Nothing can be clearer than the principle of law, that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial judge. If he is an accuser, he must not be a judge. If he has a pecuniary interest in the success of the accusation, he must not be a judge. Where such a pecuniary interest exists the law does not allow any further inquiry as to whether or not the mind was actually biassed by the pecuniary interest. The fact is established from which the inference is drawn, that he is interested in the decision, and he cannot act as a judge. But it must be in all cases a question of substance and of fact whether one of the Judges has in truth also been an accuser. The question which has to be answered by the tribunal which has to decide—the legal tribunal before which the controversy is waged—must be: Has the Judge whose impartiality is impugned taken any part whatever in the prosecution, either by himself or his agents?" I may also refer to the case of *The Queen* v. *Allan* (2) so much discussed by Lords Justices Cotton and Fry in *Leeson's Case* (1).

If the letter of the 6th July and the resolution of the 8th of the same month left anything wanting, I think the resolution of the County Council of the 12th June, 1907, passed on the motion of Mr. Arthur Mac Mahon, showed that much heat had developed. In peremptory fashion it directed proceedings to be taken at once. I cannot help thinking that much heat had been developing. Mr. Arthur Mac Mahon had retired from the Bench on the occasion of the first application; but, curiously enough, he remained on the Bench when the second application was made. He says he recon-

(1) 43 Ch. D. 366. (2) 4 B. & S. 915.

sidered his position; but did he act prudently even in his own interests? Did he permit the heat which was developing to warp his better judgment? Doubtless what largely influenced Mr. MacMahon and Mr. Meehan was the determination on Lord de Vesci's part to prevent Jelly's Pit being enlarged. The resolution to this effect, I feel quite sure, caused a feeling of irritation in the minds of the County Council; and they did not adequately, if at all, bear in mind that an owner of property may use it in any way he likes, provided his user of it does not produce a public nuisance or infringe some private right. There is, in my opinion, no principle or rule of law which in such case, at least before a magistrate's order is made or sought for, stereotypes the actual position and forbids the owner of land making the adjacent lands an orchard, or bringing the adjacent lands within the exceptions which negative jurisdiction. Mr. Meehan's adjudicating was indeed much to be regretted. He not alone was party to the resolution of the 8th July, but the application directed by that resolution was practically an appeal from the order of the 6th July from which he had dissented. In fact, it was in the nature of an appeal which practically involved, by himself and others, the justification of his previous dissent. As to the first point involved, namely, the question of bias, I am of opinion that there was, to use Lord Blackburn's words, "a real likelihood of bias"; that there were reasonable grounds for believing that these two magistrates, Mr. Meehan and Mr. Arthur Mac Mahon, would be and were "biassed."

There is one topic which I think I should say something about before I pass away from this branch of the case. It is referred to in the 16th paragraph of Mr. FitzHerbert's affidavit, which states that the county surveyor stated on cross-examination that, if left to himself, he would have accepted the terms offered by Mr. FitzHerbert's letter of the 10th May. This statement is dealt with in Mr. White's affidavit in reply. It would appear to me that he did not at first deal specifically and categorically with the question whether he made in Court the actual statement imputed to him. No doubt he says a good deal about other matters; but certainly a subsequent affidavit from Mr. FitzHerbert is calculated to show that such statement was made; and if the County Council peremptorily

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compelled the county surveyor to take a course that he thought was not necessary, it is somewhat suggestive of considerable heat on the part of the County Council.

This is enough to dispose of this case; but the second ground of impeachment I have mentioned involves a question of much practical importance, and my learned brother and I think we should deal with it. That question is, whether the order of the magistrates can be impeached on the ground that the lands surrounding Jelly's Pit were an orchard; whether if that were so the magistrates exceeded their jurisdiction in making the order? There is no doubt there is no jurisdiction to make an order authorizing the taking of materials for the repair of roads from a place that is an orchard. The magistrates have no authority to make any such order. It is a condition precedent to jurisdiction that the *locus in quo* is not an orchard: see *The Queen* v. *Justices of Wexford* (1); and it is equally clear that the magistrates cannot give themselves jurisdiction by deciding wrongly in point of fact. If in the investigation of the case the existence of an orchard, or any of the other excepted places, is established, all jurisdiction to make the order is ousted. If the magistrates proceeded to make an order, they would be doing the very thing they were in effect practically told not to do. It would be a typical instance of acting, not merely without jurisdiction, but of acting in direct opposition to the injunction they in effect received not to make an order authorizing the taking of road materials from an orchard. Certainly it is not competent for the magistrates to give themselves jurisdiction to administer the Act of Parliament as if there were no excepted places mentioned in it, by a decision erroneously made in point of fact.

The decision of the magistrates on this question of fact, as to whether the place was an orchard or not, being a question on which jurisdiction to make an order depended, can be challenged here, not merely on the ground that there was no evidence to support it, but with reference to the weight of evidence.

Did an orchard then exist? All the salient facts show that it did. Two acres and a-half of land were appropriated for an orchard; 400 apple-trees, at a cost of £40, were planted there,

(1) [1894] 2 I. R. 81.

which seem to be doing well, though, perhaps, they are as yet, having regard to their age, not bearing fruit to any considerable extent. This young orchard is under the charge of Mr. Roberts, the head gardener of Lord de Vesci. In his affidavit filed on the 16th December, 1907, Mr. Roberts deals with the subject-matter as a man of experience and skilled knowledge. His evidence seems to me more satisfactory as to the character and prospects of the orchard than Mr. Feehan's. Certainly there is a curious conflict between them as to the depth of clay to which the roots of apple-trees should be carried. Mr. Roberts deals also in a satisfactory way in both his affidavits as to the fences. I am afraid if inadequacy of fences were to deprive an orchard of its character of an orchard, that many orchards in Ireland would, if I may be pardoned for coining another word—I speak deprecatingly—be "unorcharded."

We will make absolute the conditional order, and as against Mr. Meehan and Mr. Arthur MacMahon, with costs. I do not say they were influenced by a corrupt motive, but they were conspicuously the principal—the real—offenders. They were the head and front of what took place.

GIBSON, J.:—

The question in this case relates to an order of Justices, dated 26th October, 1907, under section 162 of the Grand Jury Act, as adapted. The application was heard and granted at Petty Sessions; but the order signed and issued, which is the record subject to *certiorari*, was signed by one Justice, and purports to represent the decision as his alone. Jelly's Pit, therein mentioned, means, it is conceded, not the pit proper, which is worked out, but a lateral extension into adjoining land, alleged by the prosecutor to have been converted into an orchard. The argument has covered a wide range. At the foundation lies the question, Does section 162 confer jurisdiction finally and without appeal to declare that land is not of the excepted class?

Under the English Highways Act, 1835 (5 & 6 Wm. 4, c. 50), upon one calendar month's notice (sect. 53) to owner and occupier, the surveyor is authorized to apply to special Highways Sessions (sect. 54) for a license to get the materials (if sufficient are not

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obtainable within waste lands, &c., under sect. 51) in enclosed lands (not being of certain excepted characters), if it appears to the Justices that sufficient materials cannot be obtained as therein described, the surveyor making satisfaction for such materials, and also for damage done, to be settled by order at Special Sessions. The form of license given in the schedule, No. 10, prescribed under sect. 118, does not negative the exceptions; it describes the adjudication as confined to the necessity of getting the materials in the particular place. It recites a form of summons which also does not negative the exceptions.

Section 162 of our Act, passed the following year, authorizes the surveyor or contractor to raise materials in any lands (not being of certain excepted characters), and also to make drains for certain purposes in any lands (with the like exceptions), subject to making satisfaction for damage and materials, to be assessed by three householders; but the value of stones, gravel, and materials is not to be included, unless taken from quarries or gravel-pits *bonâ fide* demised for working. The contractor or surveyor is prohibited from entering any land for the above purpose against the will of the occupier, without the previous order of a Justice, which such Justice is required to make, on proof to his satisfaction that the materials cannot be conveniently procured elsewhere.

The English statute and form of license point to the excepted lands being removed from the Justices' jurisdiction: *R.* v. *Bradford* (1); sect. 162 is stronger in the same direction. The order may be made out of sessions by a single Justice; the section is silent as to notice, though the necessity of such notice to the occupier is implied; it gives the owner, if not in occupation, no *locus standi* to object; and it allows no compensation for the value of materials taken, save in the case of a quarry or gravel-pit tenant. The obligation in terms imposed on the Irish Justice when the statutory proof is satisfied would be probably implied in the case of the English Special Sessions in the same circumstances. The section gives no right of appeal. According to defendants' argument the order is not subject to *certiorari* or review; it is conclu-

(1) [1908] 1 K. B. 365.

sive as to the character of the land, though a non-occupying owner is expropriated without compensation and without notice; and no number of refusals can protect the owner or occupier, as the principal of *res judicata* does not apply, so that a large Bench refusing an application on the ground that the land is of the excepted class may be over-ruled next week by one magistrate, possibly a dissentient at the previous hearing. An affirmative order thus fixes the character of the land as not being within the exception; a negative order has no binding effect; and as no costs can be awarded, the hardship is obvious.

Does the section confer any such jurisdiction? It is against common right, and must be strictly construed. The owner as such has no right of audience. This circumstance, apart from the general scheme of the section, which appears to take excepted land from the Justices' cognizance, is decisive. Jurisdiction only attaches if the occupier objects. Could an occupying tenant consent so as to turn what was in fact an orchard into a quarry, and could he thereby bind his landlord by an act which would be common law waste? He clearly could not. The landlord could not be affected by such consent, and could assert his rights by an action for an injunction and damages. The jurisdiction where the occupier objects can have no wider operation. *Hemphill* v. *Frazer* (1), *Bunbury* v. *Fuller* (2), *Thompson* v. *Ingham* (3), *In re Baker* (4), *Branwell* v. *Penneck* (5), *Welch* v. *Nash* (6), are authorities supporting my conclusion. The Justice must make a preliminary inquiry whether the exception applies or not, as he must where a question arises of *bonâ fide* dispute of title, or as to service of a summons a reasonable time before hearing; but he cannot by an erroneous finding give himself jurisdiction or conclude the occupier. His decision may protect himself from an action: *Johnston* v. *Meldon* (7); but it cannot affect the rights of the parties in a collateral proceeding. My view does not conflict with the decision in *Murphy's Case* (8), where it was held that the order must negative the exceptions in order to show jurisdiction.

(1) 10 L. R. Ir. 87.
(2) 9 Ex. at p. 140.
(3) 14 Q. B. 710.
(4) 2 H. & N. at pp. 234, 245.
(5) 7 B. & C. 536.
(6) 8 East, 394.
(7) 30 L. R. Ir. 15.
(8) [1894] 2 I. R. 81.

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Counsel in that case did not refer to sect. 78 of the Act of 1877, whether from oversight or because they thought it did not apply. Possibly (though I offer no opinion on the point) that section (upon which *Sheahan's Case* (1) is the latest authority) does not extend to sect. 162, though the Petty Sessions Act, sect. 8 (last clause), might cover it, in which case it might come within sect. 21, sub-sect. 2, of that Act. It has been held in an unreported case that there cannot be a case stated on an order under sect. 162, though a case has been heard and decided without objection on the English statute: *Ramsden* v. *Yeates* (2). For the purpose of this judgment I assume that sect. 78 does not cover such order, and that *Murphy's Case* (3) so decides; but, so construed, the case is not inconsistent with my view, as it is merely an example of the old principle that jurisdiction must affirmatively appear on the face of a Justice's order.

On my view the question of *res judicata* does not arise.

Next, assuming that the Justices had general jurisdiction to adjudge that the place was not an orchard, the prosecutor further contends that the adjudication had no evidence to justify it, and must therefore be quashed.

To this defendants give three answers: (1) the order being on its face regular, is conclusive as to the existence and proof of all necessary matters to support it; (2) the orchard was made for the very purpose of defeating an application under section 162, and was an unlawful evasion of the Act; (3) the place was not a real orchard at all and was a mere colourable pretence.

1. It is clear that if the question of orchard or no orchard was not within the Justices' province to determine finally against Lord de Vesci, their decision could be quashed on *certiorari* if the Court was satisfied that the *locus in quo* was an orchard. Supposing, however, that the Justices enjoyed a wider jurisdiction, would lack of evidence justify *certiorari*?

The point has been the subject of much difference of judicial opinion. Much of the difficulty that has arisen has been caused by misapplying *Brittain* v. *Kinnaird* (4), and by treating *Reg.* v.

(1) [1907] 2 I. R. 5.
(2) 6 Q. B. D. 583.
(3) [1894] 2 I. R. 81.
(4) 1 Br. & B. 432.

Bolton (1) as laying down (apart from its particular facts) an exhaustive definition of the conditions of *certiorari*—a view which cannot be reconciled with many decisions allowing *certiorari*. Though an order, apparently regular, if made without knowledge of want of jurisdiction, protects the adjudicating Justice from an action: *Brittain* v. *Kinnaird* (2); *Johnston* v. *Meldon* (3); such order may be quashed on *certiorari*, if on affidavit it is shown that there has been an excess of jurisdiction: *Baker's Case* (4); *Reg.* v. *Farmer* (5); notwithstanding that *certiorari* is taken away: *The Roscommon Case* (6), decided on the Licensing Act which excludes *certiorari*; *Daly's Case* (7); *Penny's Case* (8). In the present case *certiorari* is not taken away; and, having regard to the peculiar nature of the power conferred by section 162 (adopting defendants' construction of that section), and to the fact that the owner has no *locus standi*, that the order purports to affect civil proprietary rights, and that there is no appeal, I am of opinion that if there was no evidence to warrant the order, *certiorari* is applicable: *R.* v. *Bradford* (9). The tendency of all recent cases is against narrowing our authority and enabling an inferior Court, by professing to make a legal order and concealing a latent vice, which would vitiate it, to bind a party by an essentially illegal adjudication without possibility of redress. On the wide question whether *Heaphy's Case* (10), supported by *Re Authers* (11), should be preferred to *Sullivan's Case* (12), decided by Morris, C.J., I express no opinion, as that question does not properly arise for decision.

2. If there was in fact an orchard, the motive of the owner in making it is immaterial. He cannot be suspended in the exercise of his proprietary rights merely because at some future time an application under section 162 may be made. He can legitimately evade the section by keeping outside it: *Simms'*

(1) 1 Q. B. 66.
(2) 1 Br. & B. 432.
(3) 30 L. R. Ir. 15.
(4) 2 H. & N. at pp. 234, 249.
(5) [1892] 1 Q. B. at p. 639.
(6) [1905] 2 I. R. 112.
(7) [1898] 2 I. R. 694.
(8) 7 E. & B. 660.
(9) [1908] 1 K. B. 365.
(10) 22 L. R. Ir. 500.
(11) 22 Q. B. D. 345.
(12) 22 L. R. Ir. 503, note.

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Case (1); *Payne's Case* (2); *Ramsden* v. *Lupton* (3); *Bradford* v. *Pickles* (4); *Macbeth* v. *Ashley* (5).

3. On the proof before the Court below I think there was a real orchard, though the trees had not reached fruit-bearing capacity. It is unfortunate that on identical facts the former decision was disregarded, and that Mr. Meehan, who dissented on the first hearing, should have taken part in the second decision.

This brings me to the point, so much discussed, the application of the principles *nemo potest esse judex in causâ propriâ*, and *nemo potest esse simul actor et judex*. Whether the Justices or any one of them were or was in fact biassed, is a matter into which the Court does not inquire. Here two of the adjudicating magistrates, certainly one, were promoters of the application and were clearly disqualified.

It was contended that the function of the magistrate under section 162 was such as to make this objection inapplicable. But the Bench had to act on objection and proof, and even assuming that jurisdiction was confined to deciding whether materials could not be conveniently obtained elsewhere, Lord de Vesci insisted that they could be so procured. The present application was made to a Court, not an administrative body; the decision was that of the entire Court, not of one magistrate, and the presence of one disqualified Justice vitiates the adjudication.

The frame of the order, signed by one Justice, conveys that he alone heard and decided the case. The point is not taken in the conditional order; but for future guidance I wish to point out that such record is not only misleading but is wrong.

The application and order are outside the Petty Sessions Act; and the order, like the English license under the Act of 1835, is the document signed and issued. At common law, the contemporary minute was not the order. The record was the order which, as the authorities demonstrate, had to be executed by all the Justices who made it. Dalton, c. 115, p. 260, so states. Jervis's Act, section 14, reproduces this rule. The authorities are uniform. I mention a few: *The Covent Garden Case* (6); *The*

(1) [1900] A. C. at pp. 334, 335.
(2) [1902] A. C. 552.
(3) L. R. 9 Q. B. 17.
(4) [1895] A. C. 587.
(5) L. R. 2 H. L. (Sc. & Div.) at [p. 359.
(6) 7 Q. B. 232.

Worthenbury Case (1); *Wilkins* v. *Hemsworth* (2); *R.* v. *Bolton* (3); *Lowther* v. *Radnor* (4). The result of this interval of time between the adjudication and the record of conviction was that there was a wide power of amendment enjoyed by the Justices, though such power did not extend to an order.

In *Murphy's Case* (5) the order stated that the adjudication was made by two; but it was only signed by one of the two, who might have been regarded as the agent of his colleague for that purpose. No objection was taken on this ground. In the present case the adjudication was made by several; the order was theirs and not that of Mr. Meehan: *Reg.* v. *O'Connell* (6). The order should have been signed by all who made it; in its present form it is not a true record. None of the other Justices ever saw it; and I do not think they could delegate to Mr. Meehan their responsibility in signing the order. The mistake has arisen from section 21, sub-section 1, of the Petty Sessions Act, which has no application to an order like this. The section was introduced to get rid of the inconvenience of the common law rule reproduced in Jervis's Act, section 14. That rule appears to me to govern this order, which is outside the Petty Sessions enactment. As both the inculpated magistrates were objected to (as is admitted in their affidavits), persisted in sitting, and have shown cause, they must pay the costs made necessary by their action.

Clancy, K.C., applied that the costs should be borne by the members of the County Council collectively.

LORD O'BRIEN, L.C.J.: No. These two gentlemen, Mr. Meehan and Mr. Mac Mahon, were manifestly the offenders. The saddle is on the right horse.

Solicitor for the prosecutor: *C. O'Connell Fitzsimon.*

Solicitor for the County Council of Queen's County: *Horace Turpin.*

Solicitor for Arthur Mac Mahon and Patrick A. Meehan: *Patrick J. Meehan.*

J. G. T.

(1) 7 Q. B. 555.
(2) 7 A. E. 807.
(3) 1 Q. B. 66.
(4) 8 East, 113.
(5) [1894] 2 I. R. 81.
(6) 20 L. R. Ir. 625.

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CARSON *v.* JAMESON (1).

(1907. No. 13,510.)

Ecclesiastical lease—Perpetuity—Variation of rent—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 90.

By lease, dated 14th September, 1789, A, who was sub-lessee of Church lands under the Archiepiscopal See of Dublin for fourteen years, with customary right of renewal, subdemised to B portion of the leasehold for fourteen years, at the rent of £5, with a covenant by A to use his best endeavours to procure renewals of his interest, and thereupon to execute and grant a renewal to B at a fine of £1 2*s.* 9*d.* By a grant in perpetuity, dated 22nd August, 1866 (pursuant to the Church Temporalities Acts), A's representatives granted the premises to B's representatives (trustees) at the rent of £5 3*s.*, "or such increased or diminished yearly rent as shall or may from time to time be substituted in the place or stead of the said hereby reserved yearly rent, pursuant to the provisions for the purpose in the said statutes in that behalf provided." The grant contained no stipulation for periodical revision :—

Held, that the rent was not variable under the provisions of the 6 & 7 Wm. 4, c. 99, s. 2, and that the grant of 1866 could not be construed as containing a contract for variation; and, also, that B's representatives, being trustees, could not have entered into a valid contract for variation of the rent in the perpetuity grant to them of 1866 (*Poirez* v. *Collum*, [1907] 1 I. R. 7), and that B's representatives were liable for the full amount of the rent reserved in the sub-perpetuity.

MOTION FOR FINAL JUDGMENT.

The action was to recover £7 14*s.* 6*d.* rent alleged to be due to the plaintiff by the defendant under the provisions of a fee-farm grant, dated the 22nd August, 1866, under which the defendant held certain premises at Harold's Cross, in the county of Dublin. The question at issue between the parties was the right of the defendant to vary the amount of the rent. By an indenture of lease, dated previous to 1789, the Archbishop of Dublin demised to the predecessors of William Hales Carroll the premises at Harold's Cross for a term, subject to renewal as therein

(1) Before MADDEN and BOYD, JJ.

mentioned. The lease was renewed from time to time, the last renewal being made to William Hales Carroll on the 14th June, 1858, and on the 10th August, 1859, William Hales Carroll obtained a grant in perpetuity of the premises subject to the rents, covenants, and reservations mentioned in the grant. By indenture of under-lease, executed prior to 1789, portion of the premises were demised to Richard Longford for a term of years, with a covenant for perpetual renewal; and after various renewals, by a grant dated the 4th of April, 1860, made between William Hales Carroll and John Rossiter, who had acquired Richard Longford's interest, William Hales Carroll granted to John Rossiter the said portion of the premises in perpetuity, subject to the rent and covenants therein mentioned. By another and inferior sub-lease, dated the 25th January, 1789, being a renewal of a previous lease, Richard Longford demised to Alexander Smyth portion of the premises for the term, and subject to the covenants for a renewal, therein mentioned; and after various renewals, John Rossiter, in whom the lessor's interest had become vested by a grant, dated the 8th January, 1861, granted to John Henry Parker, in whom the lessee's interest had become vested, the said portion of the said premises in perpetuity, subject to the rent and covenants therein. By an indenture of lease, dated the 14th September, 1789, Alexander Smyth demised to Patrick Foley portion of the premises leased to Alexander Smyth, namely, that piece of ground in the writ mentioned, to hold to him the said Patrick Foley for a term of fourteen years from the 29th September then instant at the yearly rent of £5, and this lease contained a covenant on the part of Alexander Smyth, that "the said Alexander Smyth, his executors, administrators, and assigns, shall and will at the end of every fourteen years, to be computed from the said 29th September, inst., use his best endeavours to obtain a renewal of his present lease, term, or interest, in the premises with other holdings; and if his subsequent leases, terms, and interests in the same from time to time shall be renewed, he shall and will from time to time and at all times after obtaining such renewal and renewals execute and perfect unto the said Patrick Foley, his executors, administrators, and assigns, a new lease of the said hereby demised premises for the term of fourteen years, to commence on the 29th September and

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25th March, whichever of the said days shall next precede or happen before the date of such new leases, with the like covenants for renewal as herein contained; provided the said Patrick Foley, his executors, administrators, and assigns, shall in three months next after notice in writing of the said Alexander Smyth, his executors, administrators, and assigns, having obtained a renewal, pay to him or them the sum of £1 2*s.* 9*d.* as a renewal fine, and do and shall also tender and execute a lease of the premises with, at, and under the like rents, clauses, covenants, and agreements as are herein contained, and also at and under the said proportion of such further additional yearly rents as the said Alexander Smyth, his executors, administrators, and assigns, shall be obliged to pay by such renewal or renewals, regard being had to the premises hereby demised, and to the other concerns held herewith by the said Alexander Smyth."

It appeared from the recitals in a grant, dated the 22nd August, 1866, and made between John Henry Parker of the one part, and Henry Knox Courtney and Mary Anne Duggan of the other part (the grant under which the defendant now held the premises), that all the interest of Patrick Foley became vested in one William Peck, who died in the year 1842, having by his last will appointed James Duggan his executor and trustee, who duly proved the will. James Duggan died in 1849, having by his will appointed his wife, Mary Anne Duggan, Henry Knox Courtenay, and John Classon, his executrix and executors, and this will was duly proved by Henry Knox Courtenay and John Classon. John Classon died in 1855, leaving Henry Knox Courtenay and Mary Ann Duggan surviving him, whereupon (the grant recited) "all the estate and interest and benefit of renewal of the said William Peck became and now is vested in Henry Knox Courtenay and Mary Anne Duggan." It further appeared from the recitals that Henry Knox Courtenay and Mary Anne Duggan applied to John Henry Parker, as their next and immediate landlord, to execute to them a grant of inheritance in fee-simple in the premises demised by the lease of the 14th September, 1789, and the renewals thereof. Certain disputes arose as to the amount of arrears of rent, and renewal fines, and ultimately Henry Knox Courtenay presented a petition to the Court of Chancery to compel execution of the grant,

and an order was made in the matter of Henry Knox Courtenay, Petitioner, John Henry Parker, Respondent, and the Act of 6 & 7 Wm. 4, c. 99, dated 1st December, 1864, fixing the amount of the arrears of rent, renewal fines, costs, &c. The grant further recited "that it has been calculated, ascertained, and agreed that the annual sum of £5 3*s*. is the amount of the perpetuity rent to be hereafter payable in respect of the said premises hereby granted, subject to be increased or diminished as hereinafter mentioned." By the indenture it was witnessed that John Henry Parker granted to Henry Knox Courtenay and Mary Anne Duggan the premises, to hold to them, their heirs and assigns, yielding and paying thereout the yearly rent of £5 3*s*., "or such increased or diminished yearly rent or sum as shall or may from time to time, or at any time hereafter, be substituted in the place or stead of the said hereby reserved yearly rent, pursuant to the provisions for that purpose in the said statutes in that behalf provided." All the interest of John Henry Parker in the premises was now vested in the plaintiff, and all the interest of Henry Knox Courtenay and Mary Anne Duggan in the premises under the grant was now vested in the defendant, who now held the premises from the plaintiff under the terms of the grant. The plaintiff alleged that there was now due and owing to him by the defendant one and a half year's rent under the provisions of the grant, but the defendant had declined to pay the same, and claimed that he was bound under the terms of the grant to pay such sum as the rent would amount to if varied according to the provisions of sect. 90 of the Irish Land Act, 1903. The plaintiff submitted that on the true construction of the grant, and according to the provisions of the statute affecting the matter, the rent was not variable; and further that if same was variable, the provisions of the Land Act, 1903, did not apply.

W. H. Boyd, for the plaintiff, in support of the motion:—

6 & 7 Wm. 4, c. 99, s. 2, recognizes two classes of sub-grants executed in respect of renewable sub-leases: one class where the fine and fees payable by the sub-tenant on renewal were a fixed and ascertained sum, the other class where such fine and fees were a fixed proportion of, or dependent on, the fine and fees payable

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by the immediate superior tenant; and the section provides that the average amount of such fines in each case should be added to the rent reserved by the lease to ascertain the rent payable under the grant: see also 3 & 4 Wm. 4, c. 37, s. 150. Section 5 of the Act 6 & 7 Wm. 4, c. 99, then provided for the variation of the rent of the sub-grant in cases where any portion of such rent is a proportion of, or dependent on, the average amount of the renewal fine payable by the superior tenant; but there is no provision for the variation of the rent in the other class of cases where portion of the rent represents renewal fines of fixed amount. In the present case the renewal fine provided for in the original sub-lease of the premises is a fixed amount of £1 2*s.* 9*d.*, and so there is no right to vary the rent now in question under the provision of the statutes referred to.

The references to variation of the rent which are contained in the sub-grant were inserted by a mistake of the draftsman, and cannot be construed as a contract to vary the rent apart from the statutory provisions. No material necessary for variation is provided, the average price of corn is not stated, and no time fixed. In any case the grantees in the sub-grant were trustees and could not validly contract to vary the terms of the sub-lease as altered by statute: *Poirez* v. *Collum* (1).

If this rent is variable, it is not variable, at present, under the provisions of the Irish Land Act, 1903. The grant in perpetuity to the immediate tenant was dated 10th August, 1859, and by section 142 of the 3 & 4 Wm. 4, c. 37, as applied to sub-grants by section 5 of 6 & 7 Wm. 4, c. 99, the 1st May preceding that date is the starting-point to ascertain the septennial periods for variation of the rent. The variation can only be made by application in writing to the Commissioners (now the Irish Land Commission), within four months after the expiration of every period of seven years from, in this case, the 1st May, 1859. Unless such application is made, the rent previously payable remains the rent for the whole succeeding seven years; see also section 130 of 3 & 4 Wm. 4, c. 37. Here the defendant might have applied within four months from the 1st May, 1901, and did

(1) [1907] 1 I. R. 5, 7.

not do so, and cannot again apply till after the 1st May, 1908. Section 90 of the Irish Land Act, 1903, does not apply to all rents variable according to the average prices of corn as published in the *Dublin Gazette*, as the first word of the section, "where," shows it applies only to the limited class of cases "*where* by reason *solely* of the non-publication of the average prices of produce in the *Dublin Gazette* it has become impossible in the absence of other provision to determine the amount" of variation. If the section applied to all cases of rents so variable, the first word would have been "since." The new method provided is to apply "as from the commencement of this Act." Here, since the Irish Land Act, 1903, came into operation, no septennial period has occurred on which the tenant could have made application for variation; therefore, it is not *solely* by reason of omission in the *Dublin Gazette* that the rent cannot at present be varied. When the next septennial period arrives on the 1st May, 1908, the average prices may then have been published for a sufficient time, and this section will not apply. The gales of rent claimed in this action are therefore not subject to variation or reduction. The only reported cases in which this section has been considered are the *Irish Land Commission* v. *Massereene* (1) and *Denny* v. *Wright* (2). In the *Irish Land Commission* v. *Massereene* (1) the point was not raised or discussed in the judgments of the Court. In *Denny* v. *Wright* (2) the date of the superior grant in perpetuity is not stated; but in the judgment of the Chief Baron, on page 470, he says the time for variation "admittedly has arrived, and the defendant admittedly applied for the variation"; and so the variation under the Irish Land Act was allowed.

Brunskill, for the defendants:—

The rent is variable under the terms of the sub-grant in perpetuity; the plaintiff claims under the grantor in the sub-grant, and is bound by the contract then entered into by his predecessor in title. *Poirez* v. *Collum* (3) does not apply, as the grantor in the sub-grant was not a trustee. The fact that the grantees were trustees does not bring the case within the principle

(1) [1904] 2 I. R. 502. (2) [1906] 2 I. R. 465. (3) [1907] 1 I. R. 5, 7.

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of that case, because there is no legal objection to a trustee contracting in a sub-grant in perpetuity to pay a smaller rent than that reserved by the original lease, although a trustee would have no power to contract to receive a smaller rent. The sub-grant in this case was settled in the Chambers of the Chancery Court after a hearing on a petition under the Act, and the parties cannot now contend that the rent is not variable. The judgment of the Chief Baron in *Denny* v. *Wright* (1) completely answers the second branch of the argument of the plaintiffs.

Dec. 14.

MADDEN, J. :—

This is a motion for judgment in an action brought for the recovery of the sum of £7 14*s.* 6*d.* as rent due by the defendant to the plaintiff in respect of certain premises in the county of Dublin, held by him under a perpetuity grant dated the 22nd August, 1866, executed under the provisions of the Church Temporalities Acts. The lease which was the foundation of this grant was made on the 14th September, 1789, by Alexander Smyth to Patrick Foley. The fee-simple of the demised premises was then vested in a corporation sole, the Archbishop of Dublin. There appear to have been several derivative interests created before the year 1789; an immediate lease from the See for the term of fourteen years, and a sub-lease with *toties quoties* covenant for renewal, intervening between the estate of this immediate lessee and that of Smyth, who held under a lower sub-lease, with a *toties quoties* covenant for renewal. The ultimate sub-lease to Foley comprised a portion only of the premises included in the higher leases. The habendum is for the term of fourteen years, at a rent of £5, and the lease contained a *toties quoties* covenant on the part of the lessor for renewal on payment of the sum of £1 2*s.* 9*d.* as a renewal fine. This covenant provided that the lessor should "tender and execute a lease of the premises with, at, and under, the like clauses, covenants, and agreements as are herein contained, and also at and under such proportion of such further additional yearly rent as the said Alexander Smyth, his executors, administrators, and assigns, shall be obliged to pay by such renewal or renewals, regard being

(1) [1906] 2 I. R. 465.

had to the premises hereby demised and to the other concerns held therewith by the said Alexander Smyth."

The head-lease was of the kind ordinarily described as customarily renewable. The lessee had no legal or equitable title to demand a renewal as of right. It was in the power of the Bishop to (as it was termed) run his life against the lease, in which event a higher rent would probably be exacted on its termination. It was in view of this contingency that the clause which I have read was commonly inserted in covenants for renewal *toties quoties*. If the immediate lessee accepted a lease at an increased rent, his obligation arose under the covenant, but was satisfied by the execution of a sub-lease at a rent proportionately increased.

When the fee-simple of land, the subject of this kind of tenure, was transferred from corporations sole to corporations aggregate, as was done by the Church Temporalities Acts, and afterwards by the Church Act, the position of the lessees was entirely changed. A corporation aggregate, with perpetual succession, might with safety refuse to renew; and accordingly the Legislature validated a kind of tenure, which, though legally insecure, had been made the subject of settlements and mortgages, and was treated as practically creating a perpetual interest. Accordingly, by the earliest of these statutes, 3 & 4 Wm. 4, c. 37, the immediate tenants under ecclesiastical corporations sole were empowered to obtain perpetual grants, in the manner provided by the Act, and a similar privilege was given to sub-lessees by the 4 & 5 Wm. 4, c. 90, which was extended and amended by 6 & 7 Wm. 4, c. 99.

The 142nd section of 3 & 4 Wm. 4, c. 37, contained provisions, generally applicable, for the periodical revision of the perpetuity rents payable by immediate tenants, according to the increase or decrease in the price of corn. A right to a similar revision was accorded to sub-tenants by the 5th section of 6 & 7 Wm. 4, c. 99, in the particular cases to which the section applied—that is to say, "in case any portion of the yearly rent reserved on such conveyance of any lands, tenements, or hereditaments shall be a proportion of, or dependent upon, the average annual amount, as ascertained by the Ecclesiastical Commissioners, of the renewal fine payable by the first and immediate tenant of such lands, tenements, and hereditaments." Here no such element enters into

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the calculation of the perpetuity rent, and the case comes within the 2nd section of the Act, which applies when "the fine and fees payable by such inferior tenant upon each renewal of his interest in such lands, tenements, or hereditaments shall be a fixed and ascertained sum."

Turning now to the perpetuity grant of the 22nd August, 1866, I find the reddendum as follows: "yielding and paying therefor and thereout yearly and for ever the yearly rent or sum of five pounds three shillings, good and lawful money of Great Britain and Ireland, or such increased or diminished yearly rent or sum as shall or may from time to time, or at any time hereafter, be substituted in the place or stead of the said hereby reserved yearly rent, pursuant to the provisions for that purpose in the said statutes in that behalf provided." Read literally, no increased or diminished rent could ever be fixed under this provision, inasmuch as there is no provision in that behalf in any statute. It would have been, of course, open to the parties to the perpetuity grant to contract that, notwithstanding the Church Temporalities Acts, the rent should be treated as one to which the statutory provisions for periodical revision, in accordance with the price of corn, should apply. But they have not done so; and even if such contract were embodied in the perpetuity grant, it would follow from the decision of the Court of Appeal in *Poirez* v. *Collum* (1) that the grantees in this case, holding in a fiduciary capacity, had no power to alter any of the terms of the contract in the lease, which they converted into a perpetuity grant. The circumstance that the grant was settled by the Court of Chancery has been relied on; but this was done in the matter of a summary petition under the Act for the purpose of carrying out, not altering, the contract under the lease.

Mr. Boyd has pointed out in his concise and clear argument how the present case is unaffected by the provisions of the 90th section of the Irish Land Act of 1903, which come into operation when the determination of variable rent becomes impossible by reason "solely" of non-publication of averages in the *Dublin Gazette*. This is not so in the present instance, for the reasons which I have stated

(1) [1907] 1 I. R. 7.

The respective titles of the plaintiff and defendant are not in dispute, and it is admitted that in the view which we take of the case there should be judgment for the plaintiff for the amount claimed in the writ.

BOYD, J., concurred.

Solicitors for the plaintiff: *F. Croskery & Son.*
Solicitor for the defendant: *C. & J. Robinson.*

J. L.

BERESFORD *v.* CLARKE AND OTHERS.

Vendor and purchaser—Lease upon payment of a fine—Delay—Possession taken pending completion—Liability for interest from date of possession.

Where a tenancy created *de novo* is sold, and the purchaser takes possession in anticipation of title being made (which title he afterwards accepts), the tenant, notwithstanding that the vendor is in default in making title, cannot rely on payment of rent in respect of the tenancy as a defence to the vendor's claim for interest on the purchase-money from the date of the assumption of possession.

CIVIL BILL APPEAL, which was heard by Gibson, J., at the 1908 Spring Assizes for the County of Cavan, when he reserved judgment, which was delivered in Dublin on April 25th, 1908.

These were five appeals from dismisses on the merits at Cavan in actions for interest against the defendants as respective purchasers of certain farms. E. Beresford sold by auction on 9th January, 1907, to the respective defendants the respective farms at the respective rents specified in the auction particulars, subject to certain conditions of sale. The contracts (which were all in the same form) were silent as to any intention that the purchasers were to be present tenants, but this was plainly contemplated. All agreements were signed and filed on September 18th, 1907, pursuant to the Act of 1896, and the transaction was closed on that basis. The vendor was described as proprietor in possession. Condition 3 fixed fourteen days as the limit for conveyance. Condition 4 prescribed that there was to be no abstract, and

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that the vendor should be deemed to have good title to assign Condition 5 reserved all trees. Condition 8 limited the objections to title to ten days. Condition 9 made rents run from January 1st, and rates from April 1st. Condition 12 provided that if the purchaser neglected to comply with the conditions the deposit was to be forfeited, and the vendor might re-sell. Condition 13 was this—"If from any cause whatever the purchase shall not be completed within the said period of fourteen days, the vendor, instead of relying on the foregoing condition, may charge the purchaser with interest on the purchase-money from said date until the completion of the purchase, at the rate of £5 per cent. per annum."

It is unnecessary to state the subsequent facts in reference to delay in completion, as the decision relates to liability for interest after possession had been taken by the defendants.

The defendants took possession on the following dates:—Clarke on April 1; Gilsenan on same day; Mr. L. C. Smith on February 1st; and Kemp and Weir on May 1st. This was not done under any formal agreement; but, in taking possession, there was no waiver of any substantial objections to title.

On August 30th, Mr. L. C. Smith, who was acting as solicitor on behalf of all the purchasers, suggested that the sale should be closed, and that the question as to the liability of the purchasers for interest (which was the only question remaining in dispute) should be disposed of later by civil-bill. This course was adopted, and completion took place on September 18th.

D. Henry, K.C., and *T. J. Smyth*, for the plaintiffs (appellants).

P. Law Smith, K.C., and *W. E. Wylie*, for the defendants (respondents).

The arguments of counsel appear sufficiently in the judgment.

GIBSON, J.:—

The circumstances of this sale are peculiar; but, as the contract has been executed, I abstain from criticism and confine myself to the question as to interest.

The plaintiffs base their claim on two grounds: (1) Condition

13, which applies (they say) as they were guilty of no culpable default, and, even if they were, the delay was not thereby occasioned: *Bennett* v. *Stone* (1); (2) No matter what was the cause of the delay, the purchasers must pay interest from the date of taking possession.

Mr. Wylie, for the defendants, contends (1) that the delay was attributable to the vendor's wilful default, and that the condition does not apply, being less favourable to the vendor than the common wilful default exception. For this he relies on Dart, Vendor and Purchaser (last edition)—a view conflicting with the opinion of Cozens-Hardy, L.J., in *Bennett* v. *Stone* (1). The difference between the two forms of condition (if any) is slight. (2) He argues that as the purchasers were liable for rent from January 1, they cannot be asked to pay interest as well, when the delay in completion was due to the vendor. He admits that if this had been a sale of the fee-simple outright, interest must have been paid from possession, as (apart from condition 13) the purchase-money had not been appropriated and notification thereof given.

The first question is one of difficulty; but as Mr. Henry agrees to accept interest from the date of possession, I do not decide it, since the plaintiffs appear entitled to succeed on the second ground, possession.

Mr. Henry argues that, if the purchaser takes possession, he is (quite apart from any special conditions) responsible for interest, and he relies on *Ballard* v. *Shutt* (2); *Fludyer* v. *Cocker* (3); *Birch* v. *Joy* (4); *The Attorney-General* v. *The Dean and Chapter of Christ Church* (5); *Rhys* v. *Dare Valley Railway Co.* (6). He says that the purchase-money represents portion of the fee, and that the purchaser in possession, while the price has not been paid, cannot use the rent as an answer to the claim for interest. I concur with his contention. The purchaser got the farm at a lower rent by making a capital payment, representing portion of the vendor's estate. Taking possession in anticipation of title being made (which he afterwards accepts), he cannot say that the rent satisfies the interest; the value of the land is the rent *plus* the capital

(1) [1903] 1 Ch. 509, 525.
(2) 15 Ch. D. 122.
(3) 12 Ves. 25.
(4) 3 H. L. Cas. 565.
(5) 13 Sim. 214.
(6) L. R. 19 Eq. 93.

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purchase-money, and interest. Suppose A grants B a lease for ever at £1 per annum for £1000, if B took possession, it would be preposterous to allege that by paying the £1 he would be free of interest. The principle is, that the purchaser who gets the full benefit of his bargain cannot rely on the non-execution of a conveyance, not affecting his immediate beneficial enjoyment, as an answer to a claim for interest. Whether the sale is in fee, or for a term without rent, or with rent, there is no difference. A complete or a partial alienation of the fee-simple is in principle the same. To the extent that the purchaser is enjoying the vendor's property, in actual possession, he must pay interest. The rent is for the tenancy and not for the purchase-money, the vendor's property. Interest, therefore, must be paid from the date of assumption of possession. No question as to the amount of rent was raised before me, as the civil bills only relate to interest. A concession for the period antecedent to possession might not be unreasonable. The dismisses must be reversed.

THE order was made "without prejudice to any claim for compensation from the period fixed for completion to the date of possession taken, if the delay was caused by the vendor's default."

Solicitors for the plaintiffs: *Allen & Halpin.*
Solicitor for the defendants: *L. C. Smith.*

J. C. W.

BUCHANAN *v.* TORISH (1).

Appeal.
1907.
Nov. 13, 14, 21.

Parliament—Franchise—Ten-pound-rated occupier—Aggregation of joint and separate ratings—13 & 14 *Vict. c.* 69, *s.* 110—31 & 32 *Vict. c.* 49, *s.* 6.

J. B. appeared on the list of rated occupiers for the Registration Unit of Loughash, Parliamentary Polling District of Dunamanagh, the rated value of the premises appearing as £10, and the townland where the premises were situated was given as Ballinamallaght. The claimant was rated for four separate and distinct ratings in the townland of Ballinamallaght, the aggregate of which amounted to £9 11*s.*; but the claimant was the owner of one-fifth share in a mountain adjacent to his farm, which was rated at £4 5*s.* The rate-collector proved that he collected the said rate of £4 5*s.* in different proportions from ten different parties, and that he had collected the sum of 17*s.*, being one-fifth, from the claimant; but the amounts so collected from the different parties were never segregated to the different names of the parties paying them on the rate book, the rate appearing there as one rate of £4 5*s.*:—

Held, that the claimant was not entitled to add the sum of 17*s.*, the one-fifth of the rating of the mountain, to his other ratings, so as to bring his entire rating up to £10.

JAMES BUCHANAN appeared on the List, Form No. 11, being the Supplemental List for the year 1907 of £10 rated occupiers for the Registration Unit of Loughash, Parliamentary Polling District of Dunamanagh, the rating value of the premises appearing as £10, and the townland where the premises were situated was given as Ballinamallaght.

The claim was objected to on the ground that the name should not have appeared on this particular list, as the voter's name did not appear as rated in the then last made rate, and although the voter had on the 5th September, 1907, duly served a sufficient claim to be rated under 13 & 14 Vict. c. 69, s. 110, before the opening of the Revision Court, that this would not entitle him to appear in this particular list, although it might entitle him to appear in Form No. 6 (the list of claimants as rated occupiers

(1) Before LORD O'BRIEN, L.C.J., and FITZGIBBON and HOLMES, L.JJ.

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or inhabitant householders), where, as a matter of fact, a claim did also appear for him as No. 2 thereon for the same premises.

It was admitted that the voter's rating was good as far as four separate and distinct ratings of £5, £3 10*s.*, 13*s.*, and 8*s.*, appearing in the rate-book for Ballinamallaght, were concerned. These ratings totalled £9 11*s.*; but to bring the qualification to £10 and upwards, further rating was required.

It appeared that in connexion with, or appurtenant to, a small farm of the voter (which said farm was one of the good ratings aforesaid) he was also the owner of one-fifth share in a mountain rated separately in the aggregate at £4 5*s.*, as to which mountain there were altogether ten owners in varying shares.

The said mountain was rated in the names of others than the claimant, and the rate-collector proved that he collected the said rate £4 5*s.* in varying amounts and proportions from ten different parties, and that he had collected one-fifth, that is the sum of 17*s.*, from the voter's predecessors in title (two of them), from the last of whom the claimant had purchased his one-fifth share; but the amounts so collected from the different parties were never segregated to the different names of the parties paying them on the rate-book, the rate appearing there as one rate of £4 5*s.*

The claimant now proposed to add this 17*s.* to his proved other ratings total of £9 11*s.*, and thus bring his entire rating up to £10 8*s.*

The voter had on the 5th September, 1907 (with reference to this £4 5*s.* rating), under the provisions of 13 & 14 Vict. c. 69, s. 110, served the claim to be rated as therein provided for, and it was admitted that such claim had been properly presented to the County Council of Tyrone, claiming on behalf of the said voter to be rated (with respect to the said mountain) as the joint rated occupier with two others, and to have his name inserted as such joint rated occupier in the last made rate, pursuant to the statutes in that case made and provided. The voter contended that by virtue of his so doing he was to be deemed to have been rated in respect of the said premises for at least the sum of 17*s.*, which would bring his ratings sufficiently above the £10 to secure the franchise of £10 rated occupier, and that upon these facts his name properly appeared in the said List, Form No. 11. The

objector submitted that it would be the duty of the Secretary of the County Council, under 13 & 14 Vict. c. 69, s. 20, as more recently laid down in the Registration (Ireland) Rules, 1905, to make out the said Supplemental List, Form 11, and send the same to the Clerk of the Peace before the 8th July, followed by the duty of the Clerk of the Peace, on or before the 22nd July (13 & 14 Vict. c. 69, s. 21), to publish such Supplemental List with his objections, followed by the duty on or before the 11th August (sec. 23) to publish for each polling district alphabetical lists of claimants for the several franchises *inter alia* in said Form No. 11; and as the voter had not sent in his claim to be rated until the 5th September, 1907, it was clear that the claimant's name had appeared in the said lists at a time when upon the proper foundation for it so appearing it should not have so appeared, and that to enable it to so appear either the Secretary of the County Council or the Clerk of the Peace must have been acting in excess of their duty and contrary to the requirements of the statutes on which the said List No. 11 was compiled, and consequently the name wrongly appeared in the said list.

Assuming, however, that the voter's name properly appeared on the said List Form, it was further argued that the voter's said claim to be rated was in itself ineffectual, as the share thereof of 17*s.* paid by the said voter to the rate-collector had never been segregated to the predecessors in title of the voter as a rate payable by them individually.

Upon the first objection the Revising Barrister held that the voter's name did not under the circumstances properly appear on the said list, and as to the second that the voter had no right to add the extra 17*s.* to his rating of £9 11*s.*, and thus bring it over the £10.

John Gordon, K.C., and *Babington*, for the appellant.

Ignatius O'Brien, K.C., for the respondent.

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LORD O'BRIEN, L.C.J. :—

The broad question argued in this case is this—can a person, whose separate rating, or the aggregate of whose separate ratings, does not entitle him to the £10 occupation franchise, call in aid a joint rating, so as to increase the amount of his separate rating to what is necessary to entitle him to the franchise? Can the separate rating and the joint occupation rating be aggregated so as to entitle the claimant to vote? This is the question.

Now that I have stated what *is* the question, I desire to point out what is *not* the question. We are not dealing with what has been already decided. We have not now to decide whether a man can be qualified for one portion of the qualifying year in respect of a separate rate, and in respect of another portion of the qualifying year in respect of an adequate joint rating—whether in fact adequate joint or separate rating may precede or follow each other respectively, so as to qualify in point of time for the whole year. This can be done by means of a separate claim, and it has been so decided in more than one case.

The question before us is a different one. It is not a question of the length of occupation covered at different intervals, by rating, each of which is adequate in character and amount to confer the franchise. Nor is the question one of the aggregation of separate ratings, aggregated so as to bring up the amount to a sum sufficient to qualify for a separate £10 occupation franchise. Separate ratings can be aggregated. It is so decided, and is, I believe, done every day. The question is—as I have said—can joint rating be added to separate rating, so as to supplement the deficiency in the case of separate rating? The solution of this question depends upon the true construction of the 6th section of 31 & 32 Vict. c. 49. What is that section? [His Lordship read the section.]

This is the section on which the controversy depends. It is conceded that the claimant is not entitled to the franchise conferred by this section. The aggregate rateable value of the premises is *not* such as would, if divided amongst the several occupiers, confer, so far as value is concerned, upon each a right to vote. No franchise in respect of joint rating founded on joint occupation within the meaning of the section is conferred. The

section deals with franchise arising from joint rating in respect of joint occupation and nothing else; and as regards joint rating in respect of joint occupation it is under the particular circumstances inoperative—it has no operation whatever. In my opinion, failing for its own purpose, it fails together. It is not operative as to any other franchise. It does not operate to make good a separate rating franchise. In its object and operation it is confined clearly to a franchise arising from joint rating in respect of joint occupation, and cannot be permitted to supplement rating outside the purview of the section.

But let me see how far the contention put forward on behalf of the claimant would bring us. It would, I think, logically bring us to this, that if there were nine persons jointly rated at 9*s.*, in respect of the joint occupation of one subject-matter, and the rate collected at 1*s.* a head, each of the nine would be entitled to add 1*s.* to a separate rating of £9 19*s.* to make a total rating of £10, so as to make the franchise—that is to say, nine persons would as a logical result of the hypothesis be entitled to vote, though the section—section 6 of 31 & 32 Vict. c. 49—says that only two can vote. This, I think, shows the inapplicability, the inoperativeness, of the section to effect what is contended for. What we have here, what at least was presented in argument as the basis of fact we have to deal with, is a joint rating in respect of joint occupation, and this in my opinion cannot be split up, and segregated in the manner suggested.

FITZ GIBBON, L.J.:—

I concur in the conclusion of the Lord Chief Justice. I base my judgment on the construction of the two sections—of which one gives the franchise to an occupier separately rated, and the other gives it to occupiers jointly rated. The first is 13 & 14 Vict. c. 69, s. 110:—

> "It shall be lawful for any person who shall occupy any lands, tenements, or hereditaments rated under the Acts for the relief of the poor, at a net annual value of £12 or upwards in any county, or £8 or upwards in any borough, in which there shall be a rate for the relief of the poor, and whose name shall have been omitted from such

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rate, to present a claim to be rated in respect of such premises, and upon such occupier so claiming and actually paying or tendering the full amount of the rate (if any), then due in respect of such premises, the Guardians shall insert the name of such occupier in such rate in respect of such premises as aforesaid."

If they neglect or refuse so to do, such occupier shall be deemed to have been rated in respect of such premises.

That section shows what may be done by an occupier who is wrongly omitted from the rate. The name of the claimant here was put on by the Union officer, though he did not appear to be either separately rated for £10, or jointly rated for £20. The provision for joint rating is 31 & 32 Vict. c. 49, s. 6, and I cannot make it work with the provision for separate rating which I have read. It provides that—

> "In a county where premises are in the joint occupation of several persons as owners or tenants, and the aggregate rateable value of such premises is such as would, if divided amongst the several occupiers, so far as the value is concerned, confer on each of them a vote, then each of such joint occupiers shall, if otherwise qualified, be entitled to be registered as a voter, provided always that not more than two persons being such joint occupiers shall be entitled to be registered in respect of such premises, unless they shall have derived the same by descent, succession, marriage, marriage settlement, or devise, or unless they shall be *bona fide* engaged as partners carrying on trade or business thereon."

There is no partnership here, and I cannot see how it is possible to work the provision which gives the franchise to several joint occupiers, so as to enable one of them to take, say, 1*s.* out of a joint rating—say of £5—and add it to a separate rating of, say, £11 19*s.*, or £7 19*s.*, which he already has, and so make up a separate rating of £12 or £8 under the Act 13 & 14 Vict. c. 69, or of £10 under the existing law.

These provisions must, in my opinion, be construed and worked separately. No person can be qualified, unless either his joint rating, or his separate rating, is enough to qualify him.

This is quite consistent with the aggregation of smaller ratings *of the same kind.* In the case of separate ratings, the Act is clear

that similar ratings can be aggregated. A man is none the less rated in £10 for relief of the poor, if he has lands rated at £8 and buildings rated at £2, or two lots of land rated at £5 each. The division of his rated property does not make his rating less or more. Adding several ratings together cannot fail to qualify him when he is rated for all in his own name; his name appears in different items of the rate-book, and that is all. Similarly if the joint rating of two persons amounted to £20, I think that they would be entitled to their votes, though the £20 was made up of several items. But let there be no mistake about our decision. We decide this case on the facts found by the Revising Barrister. There might be facts under which an occupier, jointly rated, could use part, or the whole, of one of his ratings to supplement another. But the case here states first—that the claimant's rating was good, so far as four separate and distinct ratings, amounting to £9 11*s.*, were concerned. It then states that *in addition*, in connexion with, or as appurtenant to, a small farm (which was one of the good ratings aforesaid), he was *the owner* of one-fifth share in a mountain rated in the aggregate at £4 5*s.*, of which mountain there were altogether ten owners in varying shares. He was one of those owners; but he was *not rated* for the mountain at all.

> "*The said mountain was rated in the names of others than the claimant*, and the rate-collector proved that he collected the said rate of £4 5*s.* in varying amounts and proportions from ten different parties, and that he had collected one-fifth, that is the sum of 17*s.*, from the voter's predecessors in title (two of them), from the last of whom the claimant had purchased his one-fifth share; but the amounts so collected from the different parties *were never segregated to the different names of the parties paying them on the rate-book*, the rate appearing there as one rate of £4 5*s.*"

That 17*s.* was not a rating at all; it was only a valuation, or estimate of value. The case is therefore mistaken as to *the rating* of 17*s.* But this is not the only mistake. The case states—

> "It was further argued that the voter's claim to rate was in itself ineffectual, as the share thereof, 17*s.*, paid by the said voter to the rate-collector, had never been segregated to the predecessors in title of the voter *as a rate payable by them individually.*"

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No rate is payable by any voter individually, *i.e.* exclusively, unless he is the sole rated occupier of the premises in respect of which it is paid; if this claimant has a property capable of being rated separately at 17*s.*, he can claim to be so rated, and then can add the 17*s.* to the £9 11*s.* But this is not the case stated.

I decide this case on the basis that there is a *joint* occupation in respect of which the claimant seeks to get 17*s.* added to his separate rating of £9 11*s.*, but in respect of the property worth the 17*s.* he has not yet been rated either jointly or separately. We have no statement either that he has been jointly rated for anything for which he ought to be separately rated, or that he has been separately, or *at all*, rated for the property which he wants to add to his aggregate separate ratings of £9 11*s.*

HOLMES, L.J. :—

I adopt in its entirety the judgment of the Lord Chief Justice, which indeed renders unnecessary the few words I have written stating the grounds of the conclusion at which I had arrived. Mr. Buchanan is in separate occupation of premises the aggregate valuation of which falls short of the necessary qualification. There are also in the Division premises which, according to the rate-book of last year, were in the joint occupation of two other persons the valuation of which was £4 5*s.* I assume in favour of Mr. Buchanan that in consequence of a notice served by him he is entitled this year to be rated for these premises jointly with the other two; and I deal with the case on the basis that the three were and are in joint occupation and jointly rated. The question is, can such a joint occupation be brought in aid of the premises separately occupied by Mr. Buchanan? This depends on section 6 of 31 & 32 Vict. c. 49, which is the only provision that entitles a joint occupier in a county to be registered as a voter. Now that section by its clear language deals only with premises in the joint occupation of several persons as owners or tenants, the rateable value of which is such as would, if divided amongst the several occupiers, confer on each of them a vote. The premises jointly occupied in this case do not come within this description, as their aggregate rateable value is only £4 5*s.* Furthermore, the proviso that follows, limiting to two the number of persons entitled

to be registered in respect of the joint occupation of such premises, shows, I think, clearly that the right conferred by the section is distinct from, and independent of, rights arising from other qualifications, and that anyone relying on joint occupation and joint rating cannot go outside the terms of the section.

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Solicitors for the appellant: *Wilson & Simms.*
Solicitor for the respondent: *James Toner.*

R. D. M.

M'BRIDE *v.* BRYANS (1).

Appeal. 1907. Nov. 11, 12, 14.

Local Government—Franchise—Separate dwelling-house—Exclusive occupation—41 & 42 Vict. c. 26, s. 5.

The voter occupied the lower portion of a dwelling-house, including a bedroom, sitting-room, and kitchen, as a separate dwelling-house; the upper portion of the house was occupied by another person as a separate dwelling-house; but the person occupying the upper portion could not have access thereto except by means of the stairs leading from the kitchen occupied by the voter. The distance between the door opening into the kitchen at the end of the hall-passage to the bottom of the stairs was short, and evidence was given to show that it might be possible for any person to reach the bottom of the stairs without walking over the floor of the kitchen.

The Revising Barrister found as a fact that the voter occupied the lower portion of the said dwelling-house, including the bedroom, sitting-room, and kitchen, as a separate dwelling-house; that the upper portion of the same house was occupied by another person as a separate dwelling-house; and that the person occupying the upper portion could not have access thereto except by means of the stairs which entered into the kitchen occupied by the voter.

He also found as a fact that no person could reach the upper portion of the building without passing through the kitchen:—

Held, by Lord O'Brien, L.C.J., and Holmes, L.J. (FitzGibbon, L.J., *dissentiente*), that the voter was not in exclusive occupation of the lower portion of the house, and was not entitled to the franchise.

APPEAL from the decision of the Assistant Revising Barrister for Mid Armagh, removing the name of Mary M'Bride from the Local Government "Supplement of the Register as an Inhabitant

(1) Before LORD O'BRIEN, L.C.J., and FITZGIBBON and HOLMES, LJJ.

Appeal. householder" of "part of house" situate in Railway Street,
1907. Armagh.

M'BRIDE *v.* BRYANS.

The following facts were found:—The voter occupied the lower portion of the dwelling-house, including the bedroom, sitting-room, and kitchen, as a separate dwelling-house; but the upper portion of the same house was occupied by another person as a separate dwelling-house; that the person occupying the upper portion could not have access thereto except by means of the stairs which entered into the kitchen occupied by the voter.

Evidence was given that it might be possible for any person stepping from the hall-passage to the stairs to reach the bottom of the stairs without walking over the floor of the kitchen or any part of it; the distance between the door opening into the kitchen at the end of the hall-passage to the bottom of the stairs being very short.

The Revising Barrister found, as a fact, that no person could reach the upper portion of the building without passing through the kitchen; and he found that the voter was not in exclusive occupation of portion of the house, and he expunged her name.

Healy, K.C., and *A. M. Sullivan*, for the appellant.

The Right Hon. J. H. Campbell, K.C., and *Calvert*, for the respondent.

Nov. 14. LORD O'BRIEN, L.C.J.:—

This case comprises but few facts, and raises a very narrow question of law. It appears that there is a house in the town of Armagh, the upper story of which is occupied by one tenant—the lower story by another tenant. The question in the case is—Does the tenant of the lower story occupy separately the subject-matter of her tenancy? The lower story includes a kitchen, and the tenant of the upper story has a right of passage to the upper story over a part of this kitchen. Can it be

said that the tenant of the lower story occupies separately? I think not. She has not the sole and exclusive use of the whole of the tenement. She has not the sole and exclusive use of the kitchen. The tenant of the upper story has a right to go through this kitchen at all times during the day and night—a most burdensome right. I know no right that in any case would be more burdensome or offensive. That being so, I do not think the lower tenant has a right to occupy or use the kitchen part of the subject-matter of the tenancy solely and exclusively. Can it be said that while the upper tenant is actually using that part of the floor of the kitchen that leads to the stairs, he is not occupying for the time being a part of the kitchen—that is to say, a part of the subject-matter of the lower tenant's tenancy?

I think that there was evidence to justify the finding. I say no more.

FITZ GIBBON, L.J.:—

In my opinion on the facts stated, the Revising Barrister had no jurisdiction to expunge the voter's name. Being on the register, it cannot be expunged without statutory authority.

The limitations of the power to deal with the names of voters who are on the register are very strict. The Act of 1885, sect. 27, enacts that the Court

> "Shall expunge the name of every person, whether objected to or not, whose qualification as stated in any list is insufficient in law to entitle such person to be included therein."

No voter can be excluded if the qualification stated is sufficient, unless upon objection properly made and sustained by proof; and there is an express provision that, where the qualifying premises appear on the list, the Revising Barrister shall not make any alteration in the description of the qualification, except for better defining it. The only question in this case is, whether the qualification, as described and proved, is sufficient. The Act of 1885, sect. 4, enacts:—

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> "Whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim as the case may be, nor shall the Revising Barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and more accurately defining the same."

The description of the qualification in the present case is "part of house," and that only. There was no application to amend, but the qualifying "part of house" is defined by the evidence, from which I will take the description of the place actually occupied by the voter.

The law as to the occupation of part of a house must be followed from the beginning to see the grounds of my opinion. The first definition of "dwelling-house" is in the Act of 1867, sect. 61:

> "'Dwelling-house' shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

This definition was modified by the Act of 1878, sect. 5—

> "In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling . . . For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part."

It must be observed that *occupation* is not here used in the sense of "sole and exclusive use," for this is contrasted with "joint use"; the use—whether "joint" or "sole and exclusive" —being *occupation*. What is the "part of house" which the Revising Barrister finds Mary M'Bride to have occupied? I give his very words:—

> "I found the following as facts—that the voter occupied the lower portion of the said dwelling-house, including the bedroom, sitting-room, and kitchen, as a separate dwelling-house."

It is only with respect to the use of one part of the kitchen, that any question of fact has arisen. We are bound by the finding that the voter occupied "the lower portion" of the building

as a separate dwelling-house. Take the case, of which there are many thousands, where each of several inhabitants has a single room in which he lives, and of which he has the sole and exclusive occupation and control: that gives him the franchise, although he has the joint occupation with others of other rooms or parts of the same building, and his dwelling-house includes these. It is impossible to hold, at the present stage of the franchise law, that a person who has the sole control of the part of the house which he occupies as a separate dwelling cannot have the franchise unless he has the sole control or exclusive occupation of the rest of the house as well.

So far for the law. What are the facts which are here held to destroy Mary M'Bride's qualification? The Barrister finds that the upper portion of the same house was occupied as a separate dwelling-house by another person, who could not have access to that upper portion except by means of the stairs which opened from the kitchen which Mary M'Bride occupied. The distance from the door to the bottom of the stairs was very short, but the Barrister

> "Found as a fact that no person could reach the upper portion of the building without *passing through the kitchen.*"

The stairs and the kitchen had a common door, and the small floor-space between the door and the bottom step was used in common, partly by the occupier of the kitchen, and partly for access to the stairs. The space thus used jointly was about a square yard. How can the joint use of that differ, in its effect on the qualification, from the countless cases where occupants of parts of houses have the joint use of halls, stairs, day-rooms, lavatories and even whole kitchens? In this case, there is nothing in Mary M'Bride's occupation of which she has not the sole and exclusive use, except a square yard of the floor inside her kitchen door, of which the inhabitant householder has the use for the limited purpose of stepping on to his stairs.

If the door were at right angles to where it is, leaving the square yard outside it, the case could not be argued. The fact which the Revising Barrister has expressly found, that the voter occupied the lower portion of the house, *including* the bedroom, sittingroom

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and kitchen, as a separate dwelling-house, is not disproved by the mere fact that the person living upstairs must step across this little bit of the kitchen-floor to reach the stairs.

I am clearly of opinion that the decision that the joint use of this little bit of the voter's dwelling by another person deprives the voter of the franchise is novel, and is inconsistent with the language of the Acts, and with the decisions upon them. The "joint use" here is an infinitesimal incident of the voter's occupation of her separate dwelling, but I am not relying on the principle *de minimis non curat lex*, though I do feel that the case of Mary M'Bride and the square yard of her kitchen-floor makes the law ridiculous.

Holmes, L.J.:—

I feel bound to consider this appeal on what is found as a fact in the case stated, namely, that the separate dwelling in respect of which the voter claims to be entitled to the franchise consists of two rooms and a kitchen. It is possible that she may have had a qualification other or different from this; but I must accept the finding of the Revising Barrister, and I am not at liberty to amend or alter it.

This being so, the only question is whether the fact that a family living on an upper floor had a right to pass at all times of the day and night over part of the kitchen to the stairs that led to their apartments, destroys a qualification which would have been good if there had been no such right. This depends upon the construction to be given to sect. 5 of 41 & 42 Vict. c. 26. I agree with Mr. Sullivan that this case is not to be treated as one of joint tenancy or joint occupation, and I also agree that a right of way over premises does not deprive the occupier of the servient tenement of the legal possession of any part of it. But I have to determine the meaning of separate occupation in the section mentioned; and, taking its language as a whole, I can give to it no other meaning than that it relates to such an occupation as carries with it the right to exclusive use. Finding it impossible to hold on the facts stated that the voter had exclusive use of the kitchen, I am of opinion that the decision appealed from ought to be affirmed.

In this case, as in many others, it is perhaps a misfortune that the franchise seems to depend on a trivial technicality; but I must assume that the language of the Legislature has been deliberately chosen, and to disregard it in one case would probably lead to confusion in many others.

Solicitor for the appellant: *P. Lavery.*
Solicitor for the respondent: *J. E. Peel.*

R. D. M.

ROULSTON *v.* KERLIN (1).

Appeal. 1907. Nov. 13.

Parliament—Franchise—Inhabitant occupier—Occupation under a letting void at law.

The Court will not investigate questions of title in Registration cases where there is such occupation as would entitle the occupier to the franchise.

J. K., the father of the claimant, was tenant of a holding to which the Land Law (Ireland) Act applied, and on the holding there was a dwelling-house occupied by the said tenant until some time before the commencement of the statutory qualifying period on the 20th July, 1906, as the dwelling-house of the farm.

Some time before the said date, J. K. let to his son, the claimant, a part of the said dwelling-house, and the claimant occupied the said part as tenant to his father during the qualifying period, the said dwelling-house being occupied by the father and son as two distinct and separate dwelling-houses. There was no other dwelling-house on the farm, and the claimant earned his living on the farm as a labourer to his father, and paid him weekly rent as tenant of that part of the dwelling-house in which the claimant lived.

The landlord did not consent in writing to the sub-letting by the tenant to claimant:—

Held, that the claimant was entitled to the franchise.

Glenn v. *Brennan* (29 Ir. L. T. R. 79) commented on and explained.

APPEAL from the Assistant Revising Barrister for Tyrone.

The following facts were proved:—

John Kerlin, father of the claimant, was tenant of a holding to which the Land Law (Ireland) Act, 1881, applied, and on the

(1) Before LORD O'BRIEN, L.C.J., and FITZGIBBON and HOLMES, L.JJ.

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said holding was a dwelling-house occupied by the said tenant until some time before the commencement of the statutory qualifying period on the 20th July, 1906, as the dwelling-house of the farm. Some time before the said date the said John Kerlin let to his son, the claimant, a part of the said dwelling-house; and the claimant occupied the said part as tenant to his father during the qualifying period, the said dwelling-houses (formerly one) being occupied by the father and son respectively as two distinct and separate dwelling-houses. There was no other dwelling-house upon the farm, and the claimant earned his living on the farm as a labourer to his father, the said John Kerlin, and paid him weekly rent as tenant of that part of the dwelling-house, in which he, the claimant, separately lived.

The landlord of the said holding had not consented in writing to the sub-letting by the tenant to the claimant.

It was contended on behalf of the objector that the letting to the claimant was consequently void under sect. 2 of the Land Law (Ireland) Act, 1881, and that the claimant was not entitled to the franchise.

The Revising Barrister held as a fact that, apart from the effect of the above objection, the claimant had in every respect proved his claim as an inhabitant occupier; and as to the objection, he held that the facts brought the case within the principle of the decision of *Glenn* v. *Brennan* (1) as contrasted with *Riddall* v. *Mullan* (2), and admitted the claim of the said George Kerlin.

John Gordon, K.C., and *Babington*, for the appellant:—

Under sect. 2 of the Land Law Act of 1881, all sub-lettings of holdings, to which the Act applies, without the consent of the landlord in writing, are absolutely void: *Meares* v. *Redmond* (3). The idea seems to have prevailed at one time that a sub-letting of that nature was voidable only, and not void, but that view was put an end to by *Fogarty* v. *Shanahan* (4). The same conclusion was arrived at under the Franchise Acts in *Riddall* v. *Mullan* (2). The reasons for the decision in *Glenn* v. *Brennan* (1) were never

(1) 29 I. L. T. R. 79.
(2) [1903] 2 I. R. 417.
(3) 4 L. R. Ir. 533.
(4) [1896] 2 I. R. 273.

given, and since the decision of *Riddall* v. *Mullan* (1), it ought now to be followed. The Court of Registry Appeal is not bound by a previous decision of that Court, if the authority of the previous decision has been shaken: *Fitzgerald* v. *Cooper* (2).

Ignatius O'Brien, K.C., and *J. Muldoon*, for the respondent, were not called on.

LORD O'BRIEN, L.C.J.:—

The question in this case really is what were the grounds of the decision in *Glenn* v. *Brennan* (3). The grounds of the decision were not expressed, because the Court could not be got together. However, the opinion of the majority of the Court was that if there was sole and exclusive occupation "as tenant," irrespective of the existence of an *actual* tenancy, that was enough. In the present case the claimant has sole and exclusive occupation "as tenant," and therefore is entitled to the vote. It would, of course, be a different matter if anything had occurred to convert the claimant into a trespasser.

FITZGIBBON, L.J.:

I concur. *Glenn* v. *Brennan* (3) decided nothing more than that a man might occupy as tenant within the meaning of the Franchise Acts, though his occupation was under a sub-letting which was prohibited by the Act of 1881, and therefore void. In *Riddall* v. *Mullan* (1) I said:—

> "Though I cannot reconcile *O'Kane* v. *Burns* with *Brennan's Case* (29 Ir. L. T. R. 79) on any grounds satisfactory to myself, both are decisions of this Court, and I must assume that they are not contradictory. The only imaginable mode of reconciling them is by holding that exclusive occupation under an illegal and void sub-letting will, until demand of possession, qualify the occupier because he holds 'as tenant,' though he is not a lawful tenant. But his occupation cannot have this effect unless it is sole and exclusive, and the difference in the facts between this case and *Brennan's Case* makes it impossible to sustain Patrick Mullan's claim upon that ground."

(1) [1903] 2 I. R. 417.
(2) I. R. Reg. & L. A. App. 62.
(3) 29 Ir. L. T. R. 79.
(4) [1896] 2 I. R. 273.

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Fitz Gibbon, L.J.

In the present case I cannot find any doubt as to the fact of the exclusive occupation of a separate dwelling; therefore the premises qualified the claimant if the sub-letting clauses of the Land Acts did not prevent them from doing so. That was the very point of *Glenn* v. *Brennan* (1). If this case and *Glenn* v. *Brennan* (1) are not identical on the material facts, I cannot see what facts could be identical.

It is certainly contrary to law, both in England and in this country, that the Registration Courts should be turned into Courts for investigating questions of title as distinguished from actual possession, occupation, or use; and whether *Glenn* v. *Brennan* (1) was rightly decided or not, I see no reason for having the question which it decided in favour of the actual occupant reconsidered by the full Court.

HOLMES, L.J.:—

If the *ratio decidendi* of the majority of the Court in *Glenn* v. *Brennan* (1) was that the letting was voidable and not void, I should be prepared to reconsider that decision, having regard to the subsequent decision in *Fogarty* v. *Shanahan* (2). But, unfortunately, judgment was not delivered, and merely the conclusion of the majority of the Court was stated, as appears from the report in the *Law Times*. I am satisfied from what I have heard to-day from two of the Judges, who were members of the Court, that the *ratio decidendi* in that case did not turn on that point at all, but on the question that though the letting was void, and there was no real tenancy, yet that the occupation was an occupation as tenant, and that was enough for the franchise. Possibly if I had been a member of the Court, I might have taken a different view; but I cannot consider the decision wrong, in the sense that I would not follow it now.

Solicitors for the appellant: *Wilson & Sims.*
Solicitor for the respondent: *James Toner.*

R. D. M.

(1) 29 Ir. L. T. R. 79. (2) [1896] 2 I. R. 273.

ROSS *v.* ROSS (1).

K. B. Div.
Matrimonial.
1908.
Feb. 24.

Separation deed—Divorce a mensâ et thoro—Covenant not to sue for greater allowance—Subsequent adultery—Dissolution of marriage and decree for judicial separation—Power of Court—Jurisdiction.

A deed of separation was executed between a husband and wife, by which it was provided that the wife should accept certain chattels and a sum of £100, and in which there was a covenant that she would not thereafter institute any proceedings to enforce any claim for any further alimony or support or maintenance.

The husband subsequently committed adultery, and the wife obtained a decree for divorce *a mensâ et thoro*:—

Held, that his subsequent adultery did not deprive him of the right to have the restraining provisions of the deed enforced.

By deed of separation dated December 16th, 1902, made between John Ross (the husband), and Mary Ross (the wife), after reciting (amongst other things) that the wife was to accept certain specified chattels and a sum of £100 in full discharge of all claims of any kind which she might then or thereafter have against her husband for maintenance or support, or otherwise, during her life, there was the following covenant:—"That the said Mary Ross shall not at any time thereafter molest or disturb the said John Ross, or incite any person on her behalf to do so, and shall not, by taking out any citation or process, or by instituting any action, or in any other manner, or by any other means whatsoever, compel the said John Ross to allow her any further alimony or maintenance, support, clothing, or lodging, other than the said sum of £100, and the said goods, chattels, or effects, nor in any way whatever to provide for her."

The payment of the sum of £100 to the wife, and the receipt by her of the chattels, &c., was admitted.

(1) Before ANDREWS, J.

K. B. Div. 1908.

Ross v. Ross.

After the date of the deed of separation the husband lived openly in adultery with the woman in reference to whom a decree of divorce *a mensâ et thoro* was subsequently pronounced against him. Subsequently the adulterous intercourse was continued. It was stated on affidavit made by the wife that she was without means of her own, and that she was being supported by an adopted daughter and her adopted daughter's husband.

The separation deed of 1902 did not contain any clause that it was to remain operative only so long as the husband did not commit adultery. On February 1st, 1907, the wife presented a petition for divorce *a mensâ et thoro* against the husband on the ground of his having committed adultery during the years 1903–1907, and on June 27th, 1907, a decree for divorce *a mensâ et thoro* was pronounced.

The wife applied for permanent alimony as from the 27th of June, 1907, the date of the decree of the divorce *a mensâ et thoro*.

W. M. Whitaker, *K.C.* (with him *J. M. Whitaker*), for the wife :—

In *Morrall* v. *Morrall* (1) it was held that, notwithstanding the existence of a deed of separation, by which the wife agreed to accept certain sums for support, and not to sue her husband for any further maintenance, she was entitled to an order for permanent maintenance in consequence of her husband's subsequent adultery. That was, no doubt, a case of dissolution of marriage, and *Gandy* v. *Gandy* (2) will be relied on by the other side, but the facts of that case are distinguishable from the present, because the adultery in this case was so open, and was continued without intermission from the very time of the execution of the separation deed, which ought to be construed as an agreement that the parties shall live apart in chastity. That being so, the case stands on a different footing from *Gandy* v. *Gandy* (2), where the Court of Appeal held that the husband had not been, in the opinion of the Court, guilty

(1) 6 P. D. 98. (2) 7 P. D. 168.

of such misconduct as to prevent him claiming the benefit of the deed: see also *Gandy* v. *Gandy* (1) in the Chancery Division.

James O'Connor, for the husband:—

The deed of separation is an absolute bar to the claim. There is a difference between the power of the Court in judicial separation and in dissolution of marriage. *Morrall* v. *Morrall* (2) decides that as the Court can vary post-nuptial settlements on dissolution of marriage, it also has power to set aside any existing agreement of the parties as regards the allowance for the wife. The present case is, of course, a case of divorce *a mensâ et thoro*, which corresponds to the English decree of judicial separation, and *Gandy* v. *Gandy* (3) decides that in such case the adultery of the husband subsequent to the separation deed is no bar to his insisting on its provisions, because adultery is not a breach of the implied conditions of the deed: see also *Bishop* v. *Bishop*; *Judkins* v. *Judkins* (4); *Lett* v. *Lett* (5).

ANDREWS, J.:—

This case has been very clearly and concisely argued, and it was worthy of discussion and consideration, because no application like the present has, so far as I am aware, ever come before the Irish Courts.

The decision in the case of *Gandy* v. *Gandy* (3), as reported in 7 Probate Division 168, in my opinion, governs the present case. A *dum casta* clause with regard to the wife used to be inserted in separation deeds. In the deed in this case there was no analogous clause regarding the husband, and no such clause can be read into or implied in that deed. The decision of *Gandy* v. *Gandy* (3), as reported in 7 P. D. 168, was considered in the subsequent case of *Gandy* v. *Gandy* (1) in the Chancery Division, and the grounds of

(1) 30 Ch. D. 57.
(2) 6 P. D. 98.
(3) 7 P. D. 168.
(4) [1897] P. 138.
(5) [1906] 1 I. R. 618.

K. B. Div. 1908. Ross v. Ross. Andrews, J.

the decision in the previous case of *Gandy* v. *Gandy* (1) were stated in the judgments in the latter case by Cotton, L.J., at p. 78, Lindley, L.J., at p. 81, and Bowen, L.J., at p. 81. *Gandy* v. *Gandy* (1), as reported in 7 P. D. 168, is also referred to by FitzGibbon, L.J., in the case of *Lett* v. *Lett* (2). The separation deed in the present case remains in force, and cannot be in any way regarded as at an end, and the decision of *Gandy* v. *Gandy* (1) applies.

English cases in which, where a decree is made of nullity of marriage or dissolution of marriage, the Courts under the provisions of the English Act, 22 & 23 Vict. c. 61, sect. 5, have power to vary settlements, have no application to the present case.

The argument of Mr. Whitaker, K.C., that the adultery of the husband in this case was so open as to distinguish it from others in which the adultery was not so open, cannot prevail against the decision in *Gandy* v. *Gandy* (1).

The wife's application must be refused, but without costs.

Solicitor for the wife: *Tughan.*

Solicitors for the husband: *J. H. Menton & Co.*

R. W. L.

(1) 7 P. D. 168. (2) [1906] 1. I. R. at p. 639.

THE KING (M'CONWAY AND BYRNE) *v.* GUARDIANS OF THE POOR OF THE BELFAST UNION.

IN THE MATTER OF JOHN M'CONWAY, AN INFANT (1).

K. B. Div. 1907. April 22.

Poor Law—Pauper child—Registration of religion—Religio sequitur patrem *—Mandamus to alter register—Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56), *s.* 49.

The provisions of section 49 of the Poor Relief (Ireland) Act, 1838, are administrative merely, and do not displace the general rule that the religion of the father is to be imputed to his infant children.

A boy of about eleven years of age, both of whose parents were dead, was placed by his maternal grandmother in the Union workhouse, and there, on her statement that he was a Protestant, registered as such. The father of the boy had been a Roman Catholic. His mother had been originally a Protestant. On her marriage she became a Roman Catholic, but on her husband's death she reverted to the Protestant religion. B., one of the Guardians of the Union, applied to the Board of Guardians on behalf of M., an uncle of the boy, and a Roman Catholic, to have the custody of the boy given to M., but a difficulty arose as to granting the application, owing to the boy being registered as a Protestant. There was no evidence that the father had abandoned his right to have the boy brought up in his own religion, or that the boy had acquired settled religious convictions as a Protestant. An application having been made by M. and B. for a writ of mandamus, to have the register amended and the boy registered as a Roman Catholic :—

Held, that the register should be so amended; and

Held, by Lord O'Brien, L.C.J., and Gibson, J., that either M. or B. had sufficient *locus standi* to apply for the writ of mandamus.

Held, by Kenny, J., that B. had sufficient *locus standi* for the purpose.

MANDAMUS.

John M'Conway the elder, the father of the above-mentioned infant, was married to Martha M'Keown, on the 31st October, 1894. He was a Roman Catholic; his wife had been a Protestant, but shortly prior to the marriage she became a Roman Catholic; and the marriage took place in a Roman Catholic Church. Two children were born of the marriage, viz., John M'Conway, the

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

K. B. Div. 1907.

THE KING v. BELFAST GUARDIANS; *In re* M'CONWAY.

infant above-mentioned, who was born on the 5th April, 1895, and baptized in a Roman Catholic Church on the 7th April, 1895, and a daughter, Mary M'Conway, born about four years later, and also baptized in a Roman Catholic Church.

John M'Conway, the elder, died on the 12th February, 1900, intestate, leaving his wife and the two children surviving him. He was attended before his death by a Roman Catholic priest. Martha M'Conway, after her husband's death, reverted to the Protestant faith. She died in the Belfast Union on the 11th January, 1906, professing the Church of Ireland religion.

On the 17th September, 1906, Anne M'Keown, the maternal grandmother of the infant, John M'Conway, entered the Belfast Union workhouse, bringing with her the infant. She stated to the Master of the Union that the boy's parents were dead, and that she and the boy were members of the Church of Ireland; and the boy was accordingly entered in the register as of that religion. On the 6th November, 1906, a resolution of the Guardians was passed, that the boy should be adopted and boarded out. The prosecutor M'Conway, a brother of John M'Conway, the elder, and uncle of the boy, applied to the Admissions Committee of the Belfast Board of Guardians for the custody of the boy; and the committee decided to recommend the Board to comply with his request. When the matter came before the Board, the chairman stated that effect could not be given to the recommendation of the committee, as the religion of the child differed from the religion of the proposed custodian, the child having been recorded on the register of the Union as a member of the Church of Ireland, and the proposed custodian, the prosecutor M'Conway, being a Roman Catholic.

On the 22nd January, 1907, the prosecutor Byrne made application to the Board of Guardians that the custody of the child should be handed over to the prosecutor M'Conway; but the application was refused, and a motion carried that the Local Government Board should be informed of the request of the prosecutor M'Conway, setting forth the facts that the child's father and mother were Roman Catholics, and that the child was baptized a Roman Catholic, for the purpose of obtaining the opinion and advice of the Local Government Board. The

prosecutor Byrne gave notice of his intention to move that the entry on the register should be changed with regard to the religion of the child, by having him entered as a Roman Catholic, instead of as a member of the Church of Ireland. At a meeting of the Board of Guardians held on the 5th February, 1907, the reply of the Local Government Board was read, stating that according to the decision in the case of *The King* (*Benson*) v. *Belfast Board of Guardians* (1), decided by the King's Bench Division on 21st December, 1905, they considered that the Guardians should register the child a Roman Catholic, as it had come to their knowledge that his parents were Roman Catholics. At the same meeting the prosecutor Byrne moved, pursuant to notice already given, that the register should be amended by altering the entry as regards the religion of the child. The motion was duly seconded, but was refused, and a motion carried, referring the matter to the Board's solicitor to advise and report at the meeting to be held on that day fortnight. Before the expiration of the fortnight the conditional order hereinafter mentioned was made, and the Board's solicitor declined to give an opinion upon the question referred to him, as he considered it would be presumptuous to offer an opinion on a matter submitted to the Court.

It was alleged in an affidavit made by the prosecutor M'Conway that, on the death of John M'Conway the elder, the deponent applied to his widow for the custody of the children, believing she would be unable to support and educate them; that she refused to do so, stating that she herself would be able to support them, and that she would have them brought up and educated as Roman Catholics.

A conditional order was obtained on the 15th February, 1907, for a writ of mandamus, directed to the Guardians of the Belfast Union, commanding them to amend the register of the Union by registering the child, John M'Conway, as a Roman Catholic, and to educate him as a Roman Catholic.

In an affidavit made by Anne M'Keown, the maternal grandmother of the boy, John M'Conway, and filed on behalf of the

(1) Unreported.

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Guardians, it was alleged that the boy was born in her house, and continued to reside with her up to the present; that during the lifetime of his father the boy had been taken by her to an Episcopal Church; that both the father and mother were aware that the boy was being educated and brought up as a Protestant, and made no objection, but on the contrary agreed to this. These statements were contradicted in affidavits in reply, filed on behalf of the prosecutors. The deponent further stated that on the death of the father, John M'Conway, Martha M'Conway, his widow, resided up to her death with deponent, and during that period went to an Episcopal Church, and the children with her; that she placed the boy at a Protestant school; that at the time of her death she was a member of the Church of Ireland, and that after her death deponent continued to educate the children in the Church of Ireland doctrine.

The Rev. S. E. Busby, the Church of Ireland chaplain of the Union, deposed that the boy, John M'Conway, had been for the past five months in the workhouse boys' school, and regularly attended Divine Service of the Church of Ireland. That he repeated correctly the Creed, the Lord's Prayer, and the Ten Commandments in the Protestant version.

The present application was to make the conditional order for the writ of mandamus absolute, notwithstanding cause.

Charles F. Doyle, K.C. (with him *M'Auley*), for the prosecutors:—

The boy should have been registered in the religion of his father. The provisions of the Poor Law Code are intended as administrative only, and do not affect the principle *religio sequitur patrem*: *The King* (*Benson*) v. *Belfast Guardians* (1).

The prosecutor, M'Conway, as a relative of the boy, has a *locus standi* to apply for a mandamus. The fact of the boy being registered as a member of the Church of Ireland was alleged as the reason for refusing to hand over the boy to him, under the provisions of section 8 of 25 & 26 Vict. c. 83. At all events the prosecutor Byrne has a *locus standi*. He is one of the Guardians

(1) Unreported.

of the Union, and as such it is his duty to see that the register is correct: 1 & 2 Vict. c. 56, ss. 42, 43.

Chambers, *K.C.*, and *Thomas Harrison*, for the Guardians:—

The mother of the boy, the surviving parent, was a member of the Church of Ireland. The Guardians are bound to register the child in the religion of the surviving parent: 1 & 2 Vict. c. 56, s. 49; Workhouse Rules of 5th February, 1849, Arts. 33 & 64 (2). *Benson's Case* (1) does not apply. The question there was, whether the mother, having registered the child as a Presbyterian, could afterwards have the register amended, and the child registered in a different religion.

The evidence shows that the father had abandoned his rights to have the child brought up a Roman Catholic; also that the child has acquired settled religious impressions in the Church of Ireland faith.

Neither of the prosecutors has a *locus standi* to apply for a mandamus. Under Art. 33 the parents, or surviving parent, alone can apply to have the register amended. Under section 49 of 1 & 2 Vict. c. 56, in the case of an orphan the only person who can object to the religion in which the child is being brought up is his guardian, or godfather or godmother.

[They referred to *The King* v. *The Benchers of Lincoln's Inn* (2).]

***M'Auley*, in reply:—**

The fact that the father, a year before his death, had his younger child baptized as a Roman Catholic, shows that he never intended to abandon his right to have his children brought up in that religion. The only evidence of the religious convictions of the boy is the statement that he can repeat the Creed, the Lord's Prayer, and the Ten Commandments. These are matters common to all forms of the Christian religion. [He referred to *In re Grey* (3); Simpson on Infants, 2nd ed., p. 129.]

LORD O'BRIEN, L.C.J.:—

This case raises a question which, in my opinion, does not involve much difficulty. A man named M'Conway married a

(1) Unreported. (2) 4 B. & S. 855. (3) [1902] 2 I. R. 684.

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woman named M'Keown, who had been a Protestant, but shortly before her marriage had become a Catholic. The marriage was celebrated by a priest. There were two children of the marriage, and both were baptized as Catholics. The father died, leaving his wife and the two children surviving him. The eldest child, about whom the controversy arises, was somewhat over four years of age when the father died. Some very short time after the death of the father the mother reverted to the Protestant religion, the religion in which she was born, and was apparently in the most indigent circumstances. The maternal grandmother brought the children to the Union in Belfast, and got them registered as Protestants. This registration was erroneous and unwarrantable, because the religion of the children was Catholic in the eye of the law, that is to say, the religion to be imputed to them, being of tender years and having formed no settled impressions, was that of their father. There was nothing in the nature of acquired, settled impressions, or forfeiture by the father of his paternal rights, to prevent the application of the principle *religio sequitur patrem.* See *Grey's Case* (1), a unanimous decision of this Court, where the subject is fully treated.

Now then, the child being wrongly registered, can the error be rectified? or is our poor law system so inelastic, so unmalleable, so incapable of rectification, that an error once made becomes as it were stereotyped and incapable of correction? This would indeed be a great reproach to our poor law system. Mr. Harrison and Mr. Chambers appeal to the 49th section of the Poor Relief Act, 1838, and contend that the mother having survived the father, and reverted to the Protestant religion, the child on registration as a Protestant became in effect a Protestant, and that Protestant he should remain. Or, perhaps, I would more accurately describe Mr. Chambers' argument by saying that he contended that the registration allocated the child to the Protestant denomination, and being so allocated, he was to be treated and educated as a Protestant; that the father's religion should be ignored, and the Common Law violated, by this process of registration. A very curious result indeed of what was in effect a conscience clause—for

(1) [1902] 2 I. R. 684.

the 49th section was really nothing else. The 49th section contemplated simply the normal condition where husband and wife were of the same religion, but certainly that section had not the effect of making the registration unalterable. It had not the effect of stereotyping error. The point is really in effect ruled by *Benson's Case* (1). There the Lord Chief Baron and my brother Gibson held that a surviving mother had no right, could not compel the Guardians, to register a child in a different religion from that of its deceased father, who was a Roman Catholic. In that case, as here, the 49th section of the Poor Relief Act was appealed to; but it was held in very carefully considered judgments, both by the Lord Chief Baron and my brother Gibson, that the section was a merely administrative section, and that it did not warrant the making of any change as regards religious denomination, or in any way derogate from a father's rights; that it in no way trenched upon the principle of *religio sequitur patrem* so far as that principle applies; that, in the language of my brother Gibson, the section was framed for indicating the broad administrative principle with reference to the great majority of inmates, where the religion of the spouses is the same, and the religion of the children would be that of the parents. But both the Lord Chief Baron and my brother Gibson held that, when it became known what the religion of the father was, his child should be registered in that religion. The Chief Baron said in so many words: "I have arrived at the conclusion that all throughout and above this administrative section there is the general law of the land in reference to the religion of children by which the Guardians are bound; and I hold that the moment the true facts came to their knowledge, which clearly demonstrated the religion in which the child ought to be registered, they were bound to act on that knowledge." This is the language of the Lord Chief Baron, and I unhesitatingly adopt it.

Mr. Chambers, in a vigorous argument, boldly asserts that once the child was registered in the religion of the surviving mother, he was caught, as it were, in an inextricable entanglement; that Protestant he became, and Protestant he should remain. That is to

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say, that the rights of the father were to be ignored and the Common Law flouted. That the triumph of error was permanent and complete. This would indeed be a serious result both for Protestant and Catholic, and would, as I have said, involve a grave slur on the administration of the poor law system. But there is no foundation for such an anomaly. The process of registration of religious persuasion is by entry in a register kept under statutory authority, and the register is directed to be submitted to the Guardians and corrected by them. Surely it is open to them to amend the register and correct any mistake that has been made? I am clearly of opinion this can be done.

Mr. Harrison argued that the applicants had no *locus standi* in this Court to make the present application. He says the only provisions, if any, that could apply are those referred to in the 33rd Article. This Article is not exclusive and exhaustive, and it is to my mind quite clear that both the applicants have a *locus standi*. The one, the uncle, under section 8 of 25 & 26 Vict. c. 83, would be entitled to get the possession, if rightly registered. The registration of the boy as a Protestant, he, the applicant, being a Catholic, was the only difficulty raised. He had direct and manifest interest in getting the register rectified; and the other applicant was, and is, Guardian, and as such had a plain duty to have the register made right.

It was asserted that the father had abandoned his rights to have the child educated according to his own religious belief; that he allowed him to remain for some time with the grandmother, who was a Protestant. The child, when the father died, was something over four years of age, and it would be a strong thing to hold that a father who was himself a Catholic, who got married by a Catholic priest, and who had his younger child baptized as a Catholic, had abandoned his right to have his elder child brought up in his own religion, because he left him with a good grandmother who occasionally took him to a Protestant place of worship. The father was born a Catholic, was married as a Catholic, got both his children baptized Catholics, and died a Catholic. He was not a man of aggressive convictions, and I may incidentally say that the most unchristianlike type of religion is aggressive Christianity. He did not attend the ceremonies of his

religion as often as he ought to have done, but there is not a shadow of ground for contending that this man had abandoned his religion, or his right to have his child brought up in that religion.

Again, it is said that the child had acquired settled religious impressions. I do not think there is any evidence to sustain this. A clergyman, the Rev. S. E. Busby, has made an affidavit which, I think, reflects great credit on him. I have never read in these so-called religious cases an affidavit I could more commend. He says that this boy, now aged about twelve, repeated the Creed, the Lord's Prayer, and the Ten Commandments in the Protestant version. But these are matters common to all forms of Christianity.

The only remaining question is as to the costs. I am clearly of opinion that the costs should not be given against the Guardians. The grandmother, who was a Protestant, brought the children to the workhouse, and there registered them. When the controversy arose, the Guardians very properly wrote to the Local Government Board to ascertain what should be done. The Local Government Board wrote back stating that *Benson's Case* decided the point, and that the child should be registered as a Catholic. The Guardians very naturally sent this letter to their solicitor, and while he was considering it, the conditional order for a writ of mandamus was applied for and granted, and the solicitor very properly refused to give an opinion on the question. I think that the Guardians acted *bonâ fide* and with great propriety, and, therefore, while granting the mandamus, we will not penalize the Guardians by giving costs against them.

GIBSON, J. :—

When John M'Conway died in 1900, both his children should have been brought up in his faith. On his death his wife reverted to her old religion, and educated the children accordingly. After her death, their grandmother, with whom they lived, placed them in defendants' workhouse, and registered them as of the Church of Ireland. Their paternal uncle, having applied under 25 & 26 Vict. c. 83, sect. 8, claimed the discharge of the boy; the application was not complied with, on the ground that he was a

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Roman Catholic, while the boy was registered as Church of Ireland. This uncle is one of the present applicants, the other being Hugh Byrne, a member of defendants' board, who moved that the registration should be corrected. The defendants consulted the Local Government Board, who were of opinion that the decision in *Benson's Case* (1) applied. Counsel for the defendants before us urge that *Benson's Case* (1) (which unfortunately has not been reported) was not in point. There the child of a Roman Catholic father, being by virtue of 52 & 53 Vict. c. 56, under the control of the Guardians, was registered by the mother as a Presbyterian, notwithstanding that the Guardians, as well as she, were aware of the father's creed. Later on she asked to have the religious denomination altered to Roman Catholic. The Guardians refused to comply. The Court decided (1) that mandamus was the appropriate remedy; (2) that if the mother was legally competent to direct the original registration, she was equally competent to demand its alteration, her religious duty and authority being continuous, and not exhausted by her primary direction; (3) that the Poor Law Code does not subvert the general rule of law that the religion of the father is *primâ facie* imputed to his infant children; that the mother was not authorized to alter that religion merely because she chanced to survive her husband, and the children became inmates of a workhouse; and that when the Guardians knew, as a matter of certainty, that the child was registered wrongly, they were under an obligation to correct the register. Defendants' counsel contend that, as the second point was sufficient to determine the case against the Guardians, *Benson's Case* (1) is not a binding authority on the facts now under consideration; and they argued (1) that neither of the applicants has such an interest as to enable him to ask for mandamus; (2) that under the Poor Law legislation, and particularly 1 & 2 Vict. c. 56, sect. 49, the religion of the surviving parent is the determining factor, and that even though the grandmother was not legally guardian of the boy, as the registration directed by her was in accordance with the mother's creed, and the boy has been so educated, the register is right and should not be altered.

I am of opinion that both the applicants have an interest

(1) Unreported.

entitling them to seek mandamus if the register is erroneous. There is no ground for supposing that the boy has formed convictions which it would be dangerous to interfere with. That would not be a matter which the Guardians could investigate or decide, and I doubt if this Court, having regard to the boy's age, no matter what his theological precocity might be, could refuse to alter the register on any such ground.

The substantial point, therefore, for consideration is whether the poor law legislation authorized the father's religion to be set aside. *Benson's Case* (1) appears to be a direct and binding authority on the very point, but in deference to the present argument I have reconsidered the whole question.

The register, which is filled up by the master in the first instance (subject to the duty of the Guardians to examine and correct under sect. 43), must record, and record truly, the religious denomination. A child of tender years can have no religion of his own; he can only possess an imputed religion. *Primâ facie* this is the father's: *Re Grey* (2). Mr Chambers contends that sect. 49 attributes to the child the religion of both parents during their lives, and the religion of the surviving parent; but, to avoid the absurdity of guardians and godparents being able to impose a change of religion, he argues that the section, when closely examined, only enables such persons to object where the registered religion is not that of the parents or the survivor. I doubt this suggested limitation, though the section is awkwardly drafted. On his view, after a child had been registered by both parents in the faith then professed by them, the mother, if she survived, could insist on the religion being changed, which would make poor law in direct conflict with ordinary law. Section 49 is only a conscience clause, imposing a restriction on the general powers of the Commissioners under sect. 3; it indicates broad principles for ordinary administrative purposes, and is not exhaustive, leaving obvious but exceptional cases (as where the creed of the parents, &c., is not the same) uncovered. It cannot be read as an express affirmative enactment superseding paternal rights in the case of pauper children. Conceivably the Legislature might, for convenience of workhouse administration, have vested in specified

(1) Unreported. (2) [1902] 2 I. R. 684.

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persons the exclusive right to direct how the religion was to be registered. But to produce that result, which would be in violation of general law, the intention should be clearly and conclusively expressed. Section 49 does not justify any such conclusion.

When the child's religion ought to be registered in accordance with the father's, and the Guardians know this, the entry in the register ought to be so made, and if it is erroneous, it should be corrected.

As I pointed out, however, in *Benson's Case* (1) the phrase *religio sequitur patrem*, though convenient, is inaccurate. A father may abandon his rights, or may consent to his child being brought up in another faith: *Re Walsh* (2). It would be out of the question that Guardians should enter on the determination of any such controversy. They are entitled, and I think *primâ facie* bound, to act on the direction of the persons or person clothed with apparently lawful authority; and save in case of error conclusively shown by admission or otherwise, they should not, where the register has been entered in accordance with such direction, alter it without an order of the Court. But their duty does not depend on such order; if they have actual knowledge that the register is wrong, they should set it right. This, however, does not authorize them to embark on a litigious inquiry, and assume the functions of the High Court in determining disputed questions of religion. It is only in a simple and clear case that the register, if *primâ facie* entered regularly, should be altered without the sanction of a Court order. The decision of sectarian controversy is always difficult, and it is of paramount importance that Guardians should be free from any suspicion of proselytizing bias. Meetings of Guardians ought not to be the arena of theological debate. In the present case, where the child, ever since the father's death, has been brought up as a Protestant, and there was a *bonâ fide* controversy as to the father's action, and the propriety and legality of the registration, the Guardians were justified in leaving the alteration of the register to the Court. In *Benson's Case* (1) the Court gave costs, but there, on the undisputed facts of which the defendants were aware, the entry was wrong and should have been corrected by them.

(1) Unreported. (2) 13 L. R. Ir. 269.

KENNY, J.:—

I agree in the conclusion arrived at by the other members of the Court, that the conditional order should be made absolute. It seems to me that three questions were involved in this case—(1) Is mandamus a proper remedy for the purpose of enforcing an amendment of the Union registry? (2) Are the prosecutors here, or either of them, entitled to invoke the jurisdiction of the Court? and (3) Are the circumstances such as to justify the issue of the writ? On the first question *Benson's Case* (1), decided in this Court, is a direct authority. On the second question I concur in thinking that one of the prosecutors, Hugh Byrne, who is one of the Guardians of the Belfast Union, has both an interest and a duty in seeing that the register is correct, and is, therefore, entitled to come to the Court for its aid. As to the third point, the case differs from *Benson's Case* (1) in this, that in that case there was a surviving parent capable of indicating the religious creed in which she desired that the child should be registered. Here, the child, on his entrance to the workhouse, was an orphan, who, so far as we know, had no guardian, and the names of whose godfather and godmother (if any) have not been disclosed. *Benson's Case* (1) again is an authority to this extent, that the law as enunciated in *Re Grey* (2) as to the father's creed being, unless in exceptional cases, the determining factor in ascertaining that of the child, is applicable to the Union registry of the child's religious persuasion. Unless, for instance, the father forfeited or abandoned his right to have his child brought up in the creed which he himself professed, or unless the child has formed other religious convictions which, in his interest, it would be unwise to disturb, the religious persuasion of the child must be regarded as that which his deceased father professed. In the case before us there was no parent to afford information to the workhouse master as to the child's religion. The master was bound to register the religious persuasion of the child upon his admission (Article 64). Neither the Act nor the workhouse rules afford the least indication as to the sources from which he is to procure information for this registration. In the case of an orphan, like the boy in this case, he would have to depend on such haphazard, and possibly unreliable,

(1) Unreported. (2) [1902] 2 I. R. 684.

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information, as would be furnished to him on the admission of the child. I am confident that the Legislature never intended that he was to enter on a careful and solemn inquiry—possibly controversial—as to the religion of every pauper, on the entry of the latter into the workhouse. Were he obliged to do so, the burden imposed on him might, in many cases, be a severe one, involving in its determination mixed questions of fact and law. In my opinion, he fulfilled the duty cast on him when, from the materials just at his hand—such as the statement of a relative, or friend, or, in the absence of such statement, from, perhaps, his own acquaintance with the antecedents of the child—he, without objection from anyone entitled to object, inserted the "Religious Persuasion" to which these materials pointed. It was argued that once the religion was registered the registration became, for workhouse purposes, stereotyped and unchangeable. I cannot for a moment think so. Article 33 provides for the amendment of the register at the desire of the parents, or surviving parent. The 43rd section of the 1 & 2 Vict. c. 56 contemplates the correction of the register by the Guardians from time to time. Therefore, it is clear the registry was not intended to be unalterable. If the master's entry were wrong, it was capable of being set right by the Board at any time when the book came before them. I am satisfied that the original entry of this child's religious persuasion was wrong. The father was a Catholic. There is no satisfactory evidence that he abandoned or forfeited his right to have the child, after his death, brought up in the teachings of his own creed. The child has no settled religious convictions, and, therefore, the religious persuasion of the child, when his grandmother brought him to the workhouse, was legally that of a Catholic, and he should have been registered as such. Having been registered as of a different religious persuasion from his proper and legal one—in consequence, I have no doubt, of the grandmother's representations, or as a reasonable inference from the circumstance that she herself was a Protestant—the registry must now be set right.

Solicitor for the prosecutors: *Thomas Maguire.*

Solicitor for the Belfast Union Guardians: *William Harper.*

J. G. T.

WOODHOUSE *v.* THE ROYAL IRISH ACADEMY OF MUSIC (1).

K. B. Div.
1908.
Jan. 20, 21, 23.

Endowed Academy—Educational Endowments (Ireland) Act, 1885 *—Scheme —Governors—Special meeting—Quorum—Professor or teacher—Appointment and dismissal of.*

A statutory scheme, forming the constitution of an Academy endowed with public funds, contained the following provisions:—Clause 39: "No professor or teacher shall be dismissed during his term of office except upon a resolution of a special meeting of the Governors, passed after due notice." Clause 34: "Every Governor shall, at or before the first meeting which he attends, sign a declaration . . . of his acceptance of the office of Governor; and until he has signed such declaration he shall not be entitled to act as Governor."

The plaintiff had been appointed a professor of the Academy under a contract made subject to the provisions of the scheme, and terminable by three months' notice on either side. The plaintiff was given a three months' notice to terminate his contract, which notice was passed at an ordinary meeting of the Governors. The plaintiff disregarded the notice; and, on attending as professor at its expiration, was expelled from the Academy by one of the Governors, whose action was subsequently adopted by an ordinary meeting of the Governors. The plaintiff then brought an action against the Academy for wrongful dismissal.

At the trial the plaintiff contended that the notice to terminate his contract was invalid—(*a*) because it was not passed at a "special meeting"; and (*b*) because there was not present at the meeting a quorum of Governors qualified under clause 34. It was proved that this latter objection applied also to the meeting which sanctioned the plaintiff's contract, and to the meeting which adopted his expulsion:—

Held, first, that the plaintiff's appointment was valid and could not be questioned; secondly, that clause 39 had reference only to a dismissal in defeasance of the contract, and not to a notice in accordance with its terms, and that the omission to summon a special meeting did not invalidate the notice; thirdly, that as the plaintiff denied the capacity of the Governors to act on behalf of the Academy in terminating his contract, he was estopped from relying on their resolution adopting his expulsion as evidence to render the Academy liable for it, since the same objection could be urged with equal force against the validity of the acts of either meeting.

(1) Before PALLES, C.B., and JOHNSON and BOYD, JJ.

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WOODHOUSE *v.* R. I. A. M.

MOTIONS for judgment by plaintiff and defendant. The action, which was tried before Gibson, J., and a special jury on December 6th, 1907, was brought to recover damages for wrongful dismissal. The facts were admitted, and the only oral evidence was that given by the plaintiff in reference to damages. As the question of liability on the part of the defendant corporation appeared to be one of law and not of fact, the Judge directed the jury to assess damages, and then took a verdict in blank. Being of opinion that the case required further argument, and knowing that both parties desired the decision of the Court *in banc*, the Judge, in order to save the expense of an adjourned argument, abstained from judgment, and left the parties to move the King's Bench Division for such judgment as they might be advised; directing that, if they should both move for judgment, the motions should be heard together as one motion.

In 1902 the plaintiff, F. Randal Woodhouse, was engaged by the Governors of the Royal Irish Academy of Music to act as professor of singing in the Academy for a year under a contract in writing. In 1903 this contract was renewed for a year. In 1904 the plaintiff was again engaged under a continuing contract, made between the Governors of the Academy and the plaintiff, by which it was agreed—

1. That the Governors of the Royal Irish Academy of Music engage the said F. R. Woodhouse as senior professor of singing, and he undertakes to give instruction in singing for such number of hours per week as the Governors shall require, at the rate of 7*s.* 6*d.* per hour, subject to the provisions of the scheme under the Educational Endowments (Ir.) Act, 1885 (48 & 49 Vict. c. 78), and to the regulations of the Governors for the time being as to hours of attendance of pupils or otherwise.

5. This contract may be determined by three months' notice on either side.

[The other clauses of the contract dealt with the holding of examinations, and are not material for the purposes of this report.]

This contract was signed by the plaintiff, but was not executed by or on behalf of the defendant corporation by seal or otherwise (*vide* clause 2, *infra*).

The plaintiff entered on his duties under the contract and received his stipulated fees till June 30th, 1906. In May, 1906, he was given three months' notice in writing terminating his engagement as professor of the Academy. This was done in accordance with the following resolution passed at an ordinary meeting of the Governors of the Academy held on May 16th, 1906:—

"Resolved, that the engagement of Mr. Woodhouse with the Royal Irish Academy of Music be terminated, and that three months' notice in writing terminating the engagement be forthwith given to Mr. Woodhouse by the secretary."

The vacation of the Academy commenced on July 1st and ended on September 20th. On this latter date the plaintiff attended at the Academy and claimed the right to resume his duties, objecting that the notice terminating his engagement was invalid, as it had not been sanctioned at a meeting of the Governors specially summoned for the purpose (*vide* clause 39, *infra*). He was prevented from entering the class-rooms by Mr. Irwin, one of the Governors, who also told the hall-porter not to admit the plaintiff again. The plaintiff asked to see the secretary, and on being told he was not in the Academy, said to Mr. Irwin: "I take it that you are representing the Governors; I have come to do my work . . ." Mr. Irwin told him to write to the Governors if he wished to make any complaint.

On September 25th, 1906, the plaintiff's solicitors wrote to the secretary of the Academy, stating that in their opinion the dismissal of the plaintiff was invalid, and that, as he had been prevented from carrying on his work at the Academy, he intended to institute an action against the Academy for wrongful dismissal. They accordingly asked for the name of the Board's solicitor who would act for the Board in the matter. The secretary of the Academy replied, acknowledging the receipt of this letter, and stating that he would "place it before the Governors in due course." No further correspondence took place between the parties.

At a meeting of the Governors of the Academy held on October 3, 1906, a resolution was passed approving of and adopting the action of Mr. J. Irwin in refusing to admit the plaintiff to the

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Academy premises on September 20th, 1906. The plaintiff issued his writ on December 11th, 1906, claiming damages for wrongful dismissal. In his statement of claim the plaintiff pleaded as follows:—

1. The plaintiff has suffered damage by the defendants' breach of a contract in writing, dated July 8th, 1904, and made between the plaintiff and the defendants, whereby it was agreed that the plaintiff should serve the defendants, and should be retained by the defendants in their service, until the said service should be determined by three months' notice in writing in accordance with the Order in Council, dated October 10th, 1889, in the capacity of senior professor.

2. The plaintiff served the defendants in the said capacity until September 20th, 1906, when the defendants, although no such notice had been given to the plaintiff by the defendants to determine the said service, wrongfully dismissed the plaintiff from their service, and refused to allow him to continue therein.

Up to the date of the trial of the action the ground upon which the plaintiff had disputed the validity of the notice of May 16th, 1906, was that it had not been sanctioned at a meeting of Governors specially summoned for the purpose (*vide* clause 39, *infra*), but at the trial the following facts were admitted:—

There were eleven Governors present at the meeting of May 16th, 1906. It was an ordinary monthly meeting (*vide* clause 33, *infra*), and five Governors only were necessary to form a quorum (*vide* clause 32, *infra*). But there were not five Governors present who had (*a*) paid their annual subscription for the year 1906, or (*b*) signed a declaration of their acceptance of the office of Governor since the date of their last election to office (none of the Governors having signed the declaration since the date of their last election to office, and only one having then paid his subscription for the current year) (*vide* clause 34, *infra*), though all save three had signed such declaration on or after the date when they were first elected.

It was also proved that at an ordinary meeting of the Governors, held on October 3rd, 1906, a report from Alderman J. Irwin with reference to the exclusion of the plaintiff on September 20th, 1906, was read and passed. At this meeting seven Governors were

present, four of whom had also attended the meeting of May 16th. Of these latter three had not signed a declaration of their acceptance of the office of Governor since the date of their last election, though all had signed a declaration on their first election, and none of them had then paid their annual subscription for the current year.

It was contended at the trial of the action that the plaintiff was estopped from denying the validity of the acts of the Governors who were present at the meeting of May 16th, 1906, by reason of the fact that a similar infirmity attached to the meeting of Governors who appointed the plaintiff to his office of professor, and that the plaintiff was bound to affirm the validity of his appointment.

The powers and duties of the Governors of the defendant corporation, and all other matters relating to its control and management, are contained in a statutory scheme framed by the Judicial Commissioners constituted by the Educational Endowments (Ir.) Act, 1885, which scheme was approved by Order in Council on October 10th, 1885. The following clauses of the scheme are material for the purposes of this report:—

Preliminary.

1. For the purposes of this Scheme, unless the context otherwise requires, the following terms shall be interpreted as follows:—

"The Act" shall mean the Educational Endowments (Ireland) Act, 1885.

"The Academy" shall mean "The Royal Irish Academy of Music" hereby incorporated, and shall include the Institution hitherto carried on at No. 36 Westland Row, in the City of Dublin, and known as the Royal Irish Academy of Music, and shall also include any other educational institution for the time being managed, maintained, or aided by the Governors under this Scheme.

"The Governors" shall mean the Governing Body of the Academy as hereby constituted.

"The Members" shall mean the Members of the Academy as hereby constituted.

"The Professors" shall mean such Members of the Teaching Staff of the Academy as shall, from time to time, be appointed by the Governors to be Professors.

The Academy.

2. The Academy shall consist of a President, three *ex-officio* Vice-Presidents, six elected Vice-Presidents, Life Members, Annual Members, and *ex-officio* Members. The Academy shall constitute a Body Corporate, by the name of

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"The Royal Irish Academy of Music," with perpetual succession and a common seal, and power to acquire and hold property, real and personal, for the purposes of this Scheme.

The elected Vice-Presidents shall be, in the first instance, such and so many of the following persons as at the date of this Scheme shall be able and willing to act:—[Here follow the names of six persons.]

3. The following persons, subject to the approval of the Governors, shall be Members of the Academy for their respective lives:—

(*a.*) All persons of full age who shall before the date of this Scheme have subscribed, or shall after the date of this Scheme subscribe, Twenty Pounds or upwards, in one sum, to the funds of the Academy.

4. The following persons, subject to the approval of the Governors, shall be Members of the Academy, for each calendar year for which they shall be qualified as hereinafter provided:

(*a.*) All persons of full age who shall subscribe One Pound or upwards, as an annual subscription to the funds of the Academy, shall be Annual Members during each calendar year for which the subscription shall have been paid.

(*c.*) All persons who shall be nominated as Annual Members by a public body or association under the provision hereinafter contained shall be Annual Members during each calendar year for which they shall be so nominated.

6. The *ex-officio* Members shall be such of the Governors, if any, as are not otherwise qualified to act as Members.

The Governors.

7. From and after the date of this Scheme a Governing Body shall be formed for the government and management of the Academy, and for the administration of the Endowments. It shall consist of the President and the Vice-Presidents of the Academy, and twenty-four representative Governors, to be appointed as hereinafter provided. Twelve of the representative Governors shall represent the Members, eight shall represent the Corporation, three shall represent the Coulson Endowment, and one shall represent the Professors: provided always that no person who is engaged in teaching Music in Ireland, except a Professor of the Academy, shall be eligible as a representative Governor.

The Governors representing the Members shall be, in the first instance, such and so many of the following persons as at the date of this Scheme shall be able and willing to act:—[Here follow the names of the Governors, originally nominated under the scheme.—1. To represent the Members—12. 2. To represent the Corporation of Dublin—8. 3. To represent the Coulson Endowment—3. 4. One Governor to represent the Professors.]

8. Four of the Governors representing the Members shall retire from office on the thirty-first day of December first happening more than twelve months

after the date of this Scheme, and four others on the thirty-first day of December in each succeeding year. The order in which the first Governors above named shall retire from office shall be determined by lot.

At an Annual Meeting of the Members to be held in the month of November or December first happening more than twelve months after the date of this Scheme, and in the month of November or December in each succeeding year, the Members present, being not less than twelve in number, may elect four Members to be Governors. The persons so elected shall enter into office on the first day of January next following their election, and shall remain in office for three years, unless in the meantime they shall vacate office as hereinafter provided. . . . Every outgoing Governor, being a Member, shall be eligible for re-election.

General Provisions as to the Members.

29. An Annual Meeting of the Members of the Academy, for the election of representative Governors, and for the transaction of ordinary business, shall be held in the month of November or December in each year, at such time and place as may be fixed from time to time by the Governors.

31. A Register of the Members, according to their classes, shall be kept by the Secretary, under the direction of the Governors, in a book to be provided for the purpose, and shall be open at all reasonable times to the inspection of the Members. . . . No person shall be entitled to act as an Annual Member in any year unless his subscription for that year shall have been paid.

General Provisions as to the Governors.

32. The President shall preside at every meeting of the Governors at which he is present. . . . Five Governors shall constitute a *quorum* and all matters and questions shall be determined by the majority of the Governors present; in every case of equality of votes the President of the meeting shall have a second or casting vote.

33. Within one calendar month after the date of this Scheme, and once at the least in every month thereafter, except during vacation, the Governors shall meet at the Academy; and they may also meet at such other times and places as they may from time to time appoint. Notice of every meeting shall be given to each Governor three clear days, or such other time as the Governors may direct, before each meeting. The President, any three Vice-Presidents, or any five other Governors, may, at any time, summon a special meeting of the Governors, giving notice to each Governor six clear days, or such other time as the Governors may direct, before the meeting, specifying in such notice the object for which the meeting is summoned and the time and place of meeting. Every meeting may be adjourned, for the completion of its business, to such time and place as the Governors present may appoint.

34. Every Governor shall, at or before the first meeting which he attends, sign a declaration in a book to be kept for that purpose, of his acceptance of

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the office of Governor, and until he has signed such declaration he shall not be entitled to act as a Governor. Minute books shall be kept by the Governors in which minutes of all their proceedings shall be duly entered. All deeds and other writings sealed with the common seal, and signed at any meetings by the Chairman of the meeting and two other Governors, shall be held to be validly executed on behalf of the Academy and of the Governors.

39. Subject to the other provisions of this Scheme, the Governors shall from time to time appoint the Professors, Lecturers, Teachers, and other members of the educational staff, and the Examiners, employed in the Academy or for the purpose of this Scheme. Subject as aforesaid, they shall fix, from time to time, the number, salaries, and other emoluments of the several persons so employed, and shall define their tenure of office, and their several and respective duties, including the duties to be performed by the Professors as members of the Board of Studies, and may make agreements with them as to the terms upon which they shall respectively hold office; they shall also from time to time appoint and fix the salaries, wages, and other emoluments of the Secretary and Accountant or Clerk, and of such domestic staff and other officers and servants as they shall from time to time deem it advisable to engage, and they may define the duties, and may terminate the service of the persons so engaged, as the Governors shall, in each case, and from time to time, think expedient. Subject as aforesaid, every person appointed by the Governors, or engaged in the service of the Academy, may at any time be suspended from office by the Governors, and shall be removable by them for such cause as they shall deem adequate, or upon reasonable notice, or upon payment of a reasonable sum, not exceeding six months' salary, in lieu of notice; provided that no Professor or Teacher shall be dismissed during his term of office except upon a resolution of a special meeting of the Governors passed after due notice. Subject as aforesaid, the Governors shall have and exercise general supervision and supreme control over the several departments and classes in the Academy; they shall, after consultation with the Board of Studies, determine the various branches of education to be taught in the Academy, and shall fix the programmes of examinations and of concerts; they shall fix the terms and vacations, and shall make such rules and regulations as they shall think fit for the maintenance of order and discipline.

The Right Hon. J. H. Campbell, K.C. (with him *Ronan, K.C.*, and *S. Moore*), for the plaintiff:—

The resolution of May 16th, 1906, dismissing the plaintiff, was invalid for three reasons—(1) It was not passed at a meeting specially summoned for the purpose: clause 39 of the scheme. (2) There was not at that meeting a quorum of Governors who had, after the date of their last election to office, signed a declara-

tion of their acceptance of the office of Governor: clause 34. (3) There was not a quorum of Governors who had paid their annual subscriptions at the date when the meeting was held. Governors representing the members of the Academy must themselves be members: clause 8; and, therefore, the provisions in clause 4 (*a*) apply to the elected Governors. These provisions are mandatory, and not directory: *In re Alma Spinning Co.* (1). That decision is more recent than *Thames Haven Dock and Railway Co.* v. *Rose* (2), and should be followed.

The dismissal of the plaintiff being invalid, he is entitled to treat the contract of employment as continuing, and to sue for breach of it, whether his salary has been paid up to the date of his discharge or not: Smith on Master and Servant, p. 146. The plaintiff's cause of action really arose when he was excluded from the Academy on September 20th, 1906. His exclusion was ratified by the Governors on October 3rd, and therefore the Academy can be made liable for it. It is true that there is no plea that the Governors, who dismissed the plaintiff, had not complied with the provisions of clause 34 of the scheme. That fact was only ascertained at the trial, but the plaintiff is entitled to rely on it now. In an action for wrongful dismissal, a master may rely on facts which he has not ascertained till the action is over: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3). The same rule must apply to both parties to the action.

The plaintiff is not estopped from questioning the validity of his dismissal by reason of the fact that the Governors who sanctioned his appointment were not qualified *de jure*. At the date of his appointment the plaintiff was not a member of the Academy, and was not bound to inquire as to the capacity of the Governors to act on behalf of the Academy: Lindley, Law of Companies, vol. i., p. 218; *Mahony* v. *The Liquidator of the East Holyford Mining Co.* (4).

D. S. Henry, K.C., and *R. W. Littledale, K.C.* (with them *T. M. Healy, K.C.*, and *Day*), for the defendant corporation:—

The provisions of the scheme are directory and not manda-

(1) 16 Ch. D. 681.
(2) 4 M. & G. 552.
(3) 39 Ch. D. 339.
(4) L. R. 7 H. L. 869.

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tory: *R.* (*Assessment Committee of Poplar Union*) v. *Ingall* (1); *R.* (*Wrice*) v. *Monaghan U. D. C.* (2); *Turner* v. *Baynes* (3); *Margate Pier Co.* v. *Hannam* (4); *Scadding* v. *Lorant* (5); *Foot* v. *Prowse* (6); Maxwell on Statutes, at p. 564. *Thames Haven Dock and Railway Co.* v. *Rose* (7), and *Howbeach Coal Co.* v. *Teague* (8), are also authorities in favour of our contention; both these cases were considered in *York Tramways Co.* v. *Willows* (9), and are unaffected by *In re Alma Spinning Co.* (10). The plaintiff cannot affirm for one purpose the acts of the Governors, and reprobate them for another: *The Brixton Medical General and Life Association* v. *Jones* (11).

[PALLES, C.B., referred to *Richardson* v. *Corcoran* (12), as showing that the Governors could be sued in their individual capacity.]

[They also cited *Dawson* v. *African Consolidated Land and Trading Co.* (13), and *British Asbestos Co.* v. *Boyd* (14).]

Ronan, K.C., in reply:—

The defendants are estopped from denying the validity of their contract with the plaintiff.

[PALLES, C.B.: I agree with that branch of your argument.]

The appointment of the plaintiff gave him a status under the scheme, and he was entitled, as a *cestui que trust* to insist that the provisions of the scheme should be complied with. Until the plaintiff was ejected from the Academy he was an "insider"; and, therefore, the authorities relied on by the defendants do not apply. The notice dismissing the plaintiff was irregular; and he is entitled to his salary until his contract has been legally determined.

The Governors, acting on behalf of the Academy, adopted the act of Alderman Irwin in preventing the plaintiff from carrying out his duties.

(1) 2 Q. B. D. 199.
(2) 5 New Ir. Jur. 73.
(3) 2 H. Blackstone's R. 560.
(4) 3 B. & A. 266.
(5) 3 H. L. Cas. 418.
(6) 1 Strange, 624.
(7) 4 M. & G. 552.
(8) 5 H. & N. 151.
(9) 8 Q. B. D. at p. 697.
(10) 16 Ch. D. 680.
(11) 61 L. T. at p. 387.
(12) 7 Ir. C. L. R. 121.
(13) [1898] 1 Ch. at p. 13.
(14) [1903] 2 Ch. 439.

[PALLES, C.B.: When you argue that the notice dismissing the plaintiff was invalid, can you, at the same time, rely on the validity of the resolution adopting the action of Alderman Irwin?]

Yes. Once the plaintiff was excluded from the Academy, he became an "outsider." He could not go into the question of the validity of that resolution: *Mahony* v. *The Liquidator of the East Holyford Mining Co.* (1). The plaintiff could only communicate with the Governors through their secretary, and was justified in treating his letter as conclusive.

PALLES, C.B.:— Jan. 25.

In my opinion, this case can be decided upon simple grounds. I have no doubt that the appointment of the plaintiff was valid, and that, for this purpose, the act of the Board of Governors, constituted *de facto*, was sufficient to bind the defendant corporation. I, therefore, approach the case upon the basis that the plaintiff must be taken to have been regularly appointed to the office of Professor of Music. Then comes the question, Was the notice dismissing him valid? Two objections to its validity have been put forward. It was argued that by clause 39 of the scheme forming the constitution of the defendant corporation a special meeting of the Governors is necessary in order to dismiss any professor or teacher of the corporation during his term of office. As to this point, I agree with Gibson, J., that this clause contemplates dismissal in defeasance of the contract with the plaintiff, and that the words of the clause "dismissal during his term of office" do not refer to the contract coming to its natural determination under the terms of the contract itself.

In the second place, it was argued that the meeting of Governors by whom the plaintiff was dismissed, was not validly constituted, because there was not present at the meeting a quorum of Governors who had complied with the provisions as to signing their names in accordance with the requirements of clause 34 of the scheme. In my opinion, it is not necessary to the decision of

(1) L. R. 7 H. L. 869.

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this case for us to determine whether or not the dismissal of the plaintiff was valid, and as the question may be of importance in future proceedings, I shall express no opinion upon it. I say only this, that I cannot bring myself to accept the contention of the defendant corporation that it should be deemed to be a public body in such a sense as would render the provisions of its constitution as to the election or appointment of its Governors directory, and not mandatory, as between the corporation and its servants. In my opinion, the analogy sought to be established between this body and a Justice of the Peace or a rating authority fails. Grave public inconvenience would arise if the acts of persons in a public capacity could be impeached upon some technical point as to the validity of their election; if, for instance, a rate could be impeached on the ground that the persons who constituted the rating authority *de facto* were, owing to some informality, not entitled *de jure* to be members of that authority; or if the act of a constable, acting under the warrant of a *de facto* magistrate, could be challenged through some technical omission in the appointment of the magistrate. I agree with Mr. Henry in thinking that it would be both unjust and inconvenient if certificates granted to pupils of the Academy of Music were to be rendered useless because the Governors who signed them were not *de jure* qualified as Governors; but I think that the considerations which would apply in a case of that kind are different from those applicable to the present. In my opinion, the Governors of the defendant corporation do not come within the category of public persons to whom the rule which I have mentioned applies; and, therefore, I shall assume that they had no authority to terminate the plaintiff's contract, and that he was not properly dismissed.

I entirely agree that when the plaintiff was expelled from the Academy on September 20, and when that act was adopted by the Board of Governors on October 3rd, 1906, the plaintiff was entitled to treat it as a dismissal. He was prevented from teaching in the Academy, or attending to his duties. There is evidence of expulsion which would enable the plaintiff to bring an action for wrongfully preventing him from earning his fees; and, if necessary, I should allow an amendment of the pleadings to enable him to recover damages on that cause

of action, though I think no amendment would be necessary for the purpose.

I further agree that the resolution of October 3rd, 1906, adopted the action of those acting as Governors, who gave notice to terminate the plaintiff's contract; but I hold that the defendant corporation is not bound thereby, for, *inter alia*, the following reason:—The plaintiff contends—and I give effect to his contention—that he has been wrongfully dismissed, because the notice to terminate his contract was passed at a meeting of Governors at which there was not present a quorum of Governors qualified to act under the provisions of the constitution. But when the plaintiff insists that for these reasons the notice dismissing him was illegal, that it was not in law a notice given on behalf of the corporation, and that it does not bind him, then I hold that it is not open to him to say that the resolution of the Governors adopting his expulsion under that dismissal is binding on the defendant corporation. When he relies upon the invalidity of the appointment of a Governor with the result of rendering invalid as the act of the corporation an act to which such Governor was a party as such, he is estopped from alleging the validity of his appointment for the purpose of showing that a further act, purporting to be that of the corporation, adopting or carrying out such prior illegal act, is the act of the corporation. The plaintiff cannot approbate and reprobate.

If the plaintiff can sustain any action in respect of his dismissal (as to which I express no opinion), it can be only against the persons in their individual capacity who acted as Governors on October 3rd, 1906.

Judgment must be entered for the defendant corporation, with costs.

JOHNSON, J.:—

I agree. The Academy for two years acknowledged and recognized the plaintiff as their professor. He taught, and was paid for teaching, in that capacity. The scheme of the Academy provides the mode by which a professor may be dismissed; and, as that mode was not pursued, the notice of dismissal was invalid. The Academy was not responsible for Irwin's acts, excluding

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or expelling the plaintiff; his action was neither directed nor adopted at any lawfully constituted meeting.

BOYD, J., concurred in the judgment of PALLES, C.B.

Solicitors for the plaintiff: *Casey & Clay.*
Solicitors for the defendant corporation: *Rosenthal & Miley.*

J. C. W.

K. B. Div. Probate. 1908. April 22.

IN THE GOODS OF WILLIAM WRENN, DECEASED (1).

Will—Mistake—Exclusion of words from probate—Correction of misdescription of legatee—Gift to "my mother."

A testator, whose assets were very small, after giving some pecuniary legacies, left "rest to my mother—all furniture also to my mother." The will was drawn up in the testator's presence by his nephew S., whose mother was the sister of the testator. The testator told S. that he wished to leave his furniture and the rest of his property to "your mother," meaning his sister, S.'s mother. S. wrote the words above-mentioned in the will, to carry out the testator's directions, but by mistake he inserted the word "my" before the word "mother."

The Court made an order that the word "my" where it occurred before the word "mother" should be struck out of the will and not included in the probate, and, being of opinion that the word "mother" was intended to refer to the testator's sister, S.'s mother, and that she was, therefore, the residuary legatee, gave her liberty to apply for administration with the will annexed.

MOTION.

This was an application on behalf of Mary McNamara, of 25 Ostman Place, Manor Street, in the City of Dublin, widow, that she might be at liberty to take out letters of administration with the will annexed (the said will bearing date the 16th day of January, 1908) of the personal estate of William Wrenn, late of Clonliffe College, in the City of Dublin, steward, deceased, who died on the 17th January, 1908, at Clonliffe College aforesaid, as the residuary legatee named in the said will, and the lawful sister

(1) Before ANDREWS, J.

of the said William Wrenn, deceased, and for an order that in such grant the word "my" should, wherever the same occurred immediately before the word "mother" in the said will, be struck out, on the grounds that the same was inserted in the said will by one Stephen McNamara in error, and without the knowledge and approval of the said William Wrenn, or for such order as to the Court might seem fit, and for the costs of the application.

The will in question was as follows:—

"This is the last will of William Wrenn, Clonliffe College, Dublin, steward of the College:—

"£5 to Geo. Hill Convent £50 for S. McNamara
"£10 to Holy Cross College
"Rest to my mother
"All furniture etc. to my mother
"£ for Masses.

"In witness whereof I set my hand this sixteenth day of January, 1908.

"(*Name*)—W. W.

"Signed by the same William Wrenn testator in presence of us both present at the same time who in his presence and in the presence of each other subscribe our names as witnesses.

"(*Names of witnesses*) Peter Connor—S. McNamara."

The material facts as stated in the affidavits made in support of the motion were as follows:—

William Wrenn died of pneumonia at Holy Cross College, Clonliffe, Drumcondra, in the City of Dublin, on January 17th, 1908, a bachelor. He had been ill for about three months previous to his death. He was a steward and resided in the College. The only property William Wrenn had was a sum of £215 lodged on deposit receipt in the Sackville Street branch of the Hibernian Bank, Dublin, and some furniture of very little value, which he had in his room at the College. He was the brother of the applicant, Mary McNamara, and maternal uncle of her son, Stephen McNamara. Stephen McNamara was with the deceased on January 16th, when the Rev. Michael Hickey, one of the Professors in the College, who was attending the deceased, told him that it would be well if his uncle made a will in order to prevent trouble about his affairs, and gave him a sheet of note paper on

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which he (Michael Hickey) had written the formal parts of a will, pointing out to him the places left blank for filling in the items, and told him when he had taken down his uncle's wishes to call in two attendants to sign it as witnesses. Stephen McNamara accordingly went back into the room, and spoke to his uncle, and reminded him that he had some money in the bank, and asked to whom he wished to leave it, and he said he would leave £5 to the Presentation Convent, George's Hill, that he would leave £10 to Holy Cross College, and £1 for masses, and the rest to his mother, Mrs. Mary McNamara (sister of the deceased)—all furniture also to his mother. As the testator told him this, he wrote into the paper which he had received from the Rev. Michael Hickey as the same now appears on the said paper. Stephen McNamara's explanation how he came to insert the words "my mother" was as follows:—"I say that the words 'rest to my mother' and 'all furniture to my mother' were used by me in filling in the said bequest to express the direction of the said William Wrenn in reference to the said Mary McNamara, the mother of me, this deponent, who is the person meant and intended to be indicated by these words. The actual words used by the deceased were, 'rest to your mother,' and 'all furniture, &c., to your mother,' meaning his sister, the said Mary McNamara; and I, in error, wrote down 'rest to my mother' and 'all furniture, &c., to my mother,' also meaning the said Mary McNamara, who is, as before stated, my own mother, to whom the deceased had said he left the rest of his property and all furniture, &c. The word 'my,' therefore, before the word 'mother' was not used by the testator, but was put in by me by mistake when trying to express what the testator said; and the testator did not know that I wrote down the word 'my.' I also intended when I wrote '£ for masses' to carry out the deceased's wish to leave £1 for masses, which was what the deceased told me to put down. When I had filled in the items on the paper, I went over them all for the deceased, and he said it was all right, but he did not know what words I had actually used, nor that I had written down the words 'my mother.'" He then deposed that he called in Peter Connor, one of the attendants, and that the testator put his initials "W. W." on the paper in his presence and in the presence of

Peter Connor, who duly witnessed the signature. William Wrenn's mother had died many years ago, and he left no parent or grand-parent him surviving. The next-of-kin of Wm. Wrenn, other than the applicant, were children of a deceased brother and sister, who were served with the notice of motion.

Hugh Kennedy, for the applicant, Mary McNamara :—

The word "my" was inserted in error, and should be struck out, though it leaves the word "mother" ambiguous: *Morrell* v. *Morrell* (1); *Vaughan* v. *Clerk* (2); *Goods of Schott* (3); *Goods of Boehm* (4); *Goods of Reade* (5); *Brisco* v. *Baillie Hamilton* (6); and the proper course to take is to apply on motion or on the application for grant with will annexed, to have such omission made from the probate or grant, before going to the court of construction to interpret the will: *Re Waller-White* v. *Scoles* (7), *per* Sir F. Jeune.

The affidavits show that the person intended to be indicated by the word "*mother*" was the mother of Stephen McNamara, testator's sister; and she asks to have liberty to take out a grant, with the will annexed, in the character of residuary legatee, and for this purpose asks the Court to determine that she is that person. The Court has jurisdiction on a motion of this kind to act as a court of construction for the purpose of ascertaining the person to whom a grant is to be given, notwithstanding that such determination involves the determination of persons to benefit under the will, *e.g.*, as residuary legatee: *Thorn* v. *Dickens* (8); *Goods of Hubbuck* (9); *Goods of Chappell* (10); *In re Twohill* (11). Such jurisdiction ought especially to be exercised in the case of a small estate.

(1) 7 P. D. 68.
(2) 87 L. T. (N. S.) 144.
(3) [1901] P. 190.
(4) [1891] P. 247.
(5) [1902] P. 75.
(6) *Ibid.* 234.
(7) 80 L. T. (N. S.) 701.
(8) [1906] W. N. 54.
(9) [1905] P. 129.
(10) [1894] P. 98.
(11) 3 L. R. Ir. 21.

K. B. Div. 1908. *In re* Wrenn.

Andrews, J.:—

I think I can make the order. The estate is small, and the next-of-kin have been served and do not appear. The order will be as follows:—That the word "my" where it occurs in two places before the word "mother" in the paper writing, bearing date the 16th day of January, 1908, purporting to be the last will of William Wrenn, deceased, be struck out of the said will, and be not included in the probate thereof; and the Court being of opinion, and so deciding, that the word "mother" in the said paper writing was intended by the said deceased to refer to and to designate Mrs. Mary McNamara of 25 Ostman Place, Manor Street, Dublin, widow, and that she is, therefore, the residuary legatee named in the said paper writing, Let the said Mary McNamara be at liberty to apply for administration, with the will annexed, as the last will of the said deceased, and declare her entitled to her costs out of the assets on extracting the grant.

Solicitor: *Richard A. MacNamara.*

W. L.

THE KING (COUNTY COUNCIL OF THE COUNTY OF DUBLIN AND THE SCHOOL COMMITTEE OF THE SOUTH DUBLIN RURAL DISTRICT COUNCIL) *v.* KEATING (1).

K. B. Div. 1907. Oct. 29, 31. — *Appeal.* 1908. Jan. 20, 22.

Irish Education Act, 1892 (55 & 56 *Vict. c.* 42), *sect.* 3, *sub-sect.* 5—*School Attendance Committee—Revenue from penalties—Amount of penalty applicable in relief of local rate—Fines Act* (*Ireland*), 1851 (14 & 15 *Vict. c.* 90), *sect.* 13—*Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 22, *sub-sect.* 8.

Section 3 of the Irish Education Act, 1892, creates a School Attendance Committee, and sub-section 5 provides that the expenses of the Committee shall be defrayed out of the local rate; "but any revenue from penalties in the place or district shall be applied in relief of the local rate":—

Held, by the King's Bench Division and the Court of Appeal, that where, on a prosecution by a School Attendance Committee for an offence against the Act, a fine is imposed, the Committee are not entitled to have paid to them the whole amount of the fine for the purpose of being applied in relief of the local rate, but only such portion as the Justices may award to them under section 13 of the Fines Act (Ireland), 1851, or section 22, sub-section 8, of the Petty Sessions (Ireland) Act, 1851—that is to say, a sum not exceeding one-third of the fine, the remainder being payable to the Crown.

MANDAMUS.

In a case heard at the Petty Sessions held at Tallaght, in the County of Dublin, on the 13th May, 1907, in which the School Committee of the South Dublin Rural District Council were complainants, and one John Downes was defendant, the defendant was fined the sum of 5*s.*, including costs, for failing to comply with an attendance order previously issued at Tallaght Petty Sessions; and it was ordered that the entire of the fine should be paid to the complainants in relief of the local rate.

The fine was paid by Downes to the Clerk of Petty Sessions, Mr Joseph Keating, and application was made to him by the

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and JOHNSON and WRIGHT, JJ.

K. B. Div. 1907.

THE KING (DUBLIN Co. COUNCIL) *v.* KEATING.

solicitor for the County Council of Dublin, on behalf of the School Committee, for the amount of the fine; but Mr. Keating stated that by a circular issued by the Registrar of Petty Sessions he was directed that fines inflicted under the Irish Education Act, 1892, were to be applied as directed by sect. 13 of the Fines Act, 1851, and that, therefore, he could not pay the fine to the School Committee. Prior to the issue of this circular no objection had been made to the payment of the entire fine in such cases to the School Committee.

The prosecutors obtained a conditional order for a writ of mandamus directed to Mr. Joseph Keating, commanding him to pay to the credit of the prosecutors the sum of 5*s.* received by him as Petty Sessions Clerk, in order that the same might be applied in relief of the local rate, in pursuance of sect. 3, sub-sect. 5, of 55 & 56 Vict. c. 42.

Notice having been given that counsel on behalf of the Crown would move to show cause against making absolute the conditional order, and to have the conditional order discharged, application was now made on behalf of the prosecutors to make the conditional order absolute.

Clancy, K.C., and *George C. Green*, for the prosecutors:—

We submit that the words "any revenue from penalties" in sect. 3, sub-sect. 5, of the Irish Education Act, 1892, mean the whole amount of the penalty imposed. The contention of the Crown is, that these words mean merely such portion of the penalty as may be awarded to the prosecutor under sect. 13 of the Fines Act, 1851, or sect. 28, sub-sect. 8, of the Petty Sessions Act, that is to say, a sum not exceeding one-third of the penalty. If this construction were right, there would have been no necessity for sub-sect. 5 of sect. 3 of the Act of 1892, since the object would have been effected by the prior Acts. Where the intention is that only a portion of the fine is to be applied in aid of the rates, the Legislature so enacts in express language, as in sect. 8 of 16 & 17 Vict. c. 119. By sect. 4, sub-sect. 2, of the Act of 1892, the maximum fine of 5*s.* is to include costs, and the costs are included in the fine of 5*s.* imposed in the present case. Can it be contended that the Crown is to get two-thirds of the costs as well as of the fine?

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the Crown :— K. B. Div. 1907.

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The words in sect. 3, sub-sect. 5, of the Act of 1892 are "any revenue from penalties," not "penalties" or even "*the* revenue from penalties." The intention was merely to impose a trust for the benefit of the local rate on such part of the penalty as might be awarded to the prosecutors under sect. 13 of the Fines Act, or sect. 28, sub-sect. 8, of the Petty Sessions Act. If the intention had been to alter the existing law in this respect, a provision to that effect would have been inserted in sect. 7, which deals with proceedings before a Court of summary jurisdiction. When the Legislature intends that the whole penalty shall be applied in aid of the local rate, it so provides in clear and unambiguous language, as in sect. 197 of the Municipal Corporations (Ireland) Act, 1840, and sect. 26 of the Sale of Foods and Drugs Act, 1875. The Act of 1892 creates several offences in which the School Attendance Committee need not necessarily be the prosecutors. Could it be contended that if a prosecution in such case was brought by a private person, as it might be, there would be no power to award him a share of the penalty, but that the whole must go in relief of the poor rate? As to the point of the fine including costs, it may be that the order in the form in which it is made is bad, and could be quashed on *certiorari*, but, however that may be, the present application, which is for payment of the whole sum to the prosecutors, cannot be sustained.

Cur. adv. vult.

LORD O'BRIEN, L.C.J. :— Oct. 31.

The question we have to determine is a narrow but important one. That question is, whether the whole amount of the penalties —the fines inflicted under the Education Act (55 & 56 Vict. c. 42)— is to be applied in relief of the local rate, or whether so much only of such fines or penalties as may reach the hands of the local authorities is applicable exclusively for that purpose. The question depends upon the true construction of sect. 3, sub-sect. 5, of the Act. Before I read that sub-section let me say that we are unanimously of opinion that section 13 of the Fines Act, 1851, and sect. 22, sub-sect. 8, of the Petty Sessions Act, as to the

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Lord O'Brien, L.C.J.

appropriation of fines and penalties, are applicable to fines and penalties recoverable under the Irish Education Act, 1892. These sections of the Fines Act and of the Petty Sessions Act deal with all fines and penalties; and the appropriation or application of the fines and penalties recoverable under the Education Act would be apportionable under these sections, if sub-sect. 5 of sect. 3 of the 55 & 56 Vict. c. 42, does not modify their application. Does that sub-section then wholly supersede the power of appropriation and apportionment conferred by the Fines Act and Petty Sessions Act? or does it provide solely for the application of so much of the amount of the penalties and fines as may, under the Fines Act and Petty Sessions Act, be awarded to the prosecuting authority? Does sect. 3, sub-sect. 5, provide for the destination of the whole of the fines or penalties inflicted? or does it deal exclusively with such part of them as may reach the hands of the local authority under the provisions of the Fines Act or Petty Sessions Act? This brings us to the sub-section we have to construe. It runs as follows:—"The expenses of a School Attendance Committee, and the salaries and expenses of their officers, shall be defrayed by the local authority out of the local rate; but any revenue from penalties under this Act in the place or district shall be applied in relief of the local rate." The two important words in that sub-section are the word "revenue" and the word "applied." What does the word "revenue" mean? It means income—income from fines and penalties—so much as might be awarded out of fines and penalties to the local authority, and not the whole amount of the fines and penalties. The sub-section does not say "fines and penalties," or "the amount of the fines and penalties." It plainly meant the revenue—the income—to the local authority from fines and penalties; and the sub-section, by the words "shall be applied," directed the exclusive application for the relief of the local rate of such apportioned sum as might reach the hands of the local authority—might be awarded to the local authority under the Fines Act or Petty Sessions Act—the application of which sum could theretofore have been made according to the discretion of the prosecutor. The object of the sub-section was to control and limit the application of a part, and not to provide for the destination of the whole. When the Legislature wished to

deal with the entire amount of a fine or penalty, it knew how, and used appropriate language: see Sale of Food and Drugs Act, 1875, sect. 26.

JOHNSON, J.:—

The question to be decided in this case appears to me perfectly simple. In the concise language of the Solicitor-General it is what, in the Act of Parliament, 55 & 56 Vict. c. 42, is the meaning of four words in section 3, sub-sect. 5, "any revenue from penalties"? In the words of Lord Russell in *The Queen* v. *Titterton* (1), "The duty of the Court when called upon to construe an Act of Parliament is, I conceive, to read the Act itself, and if its language is clear, to give effect to what the Legislature has said." This statute (55 & 56 Vict. c. 42) provides for the compulsory education of children, and provides funds for that purpose. Section 3 creates a School Attendance Committee, and in sub-sect. 5 provides that their expenses, and the salaries and expenses of their officers, shall be defrayed by the local authority out of the local rate. So far, the Act provides a certain source of income for certain demands on it. The sub-section then proceeds to relieve this local rate contingently by a source of income, fluctuating and uncertain in amount, in these words, "but any revenue from penalties under this Act in the place or district shall be applied in relief of the local rate." Penalties under this Act are recoverable before Justices under sect. 7. Then appropriation of penalties by the Justices is governed (for this purpose) by the Fines Act, 14 & 15 Vict. c. 90, s. 13, and the Petty Sessions Act, 14 & 15 Vict. c. 93, s. 22, by which any sum not exceeding one-third of the fine or penalty may by the Justices be awarded to the prosecutor or informer. Therefore, "*any* revenue from penalties under this Act" simply means, as it says, whatever income from the source of penalties under this Act is received by the Committee of School Attendance, and that is any sum not exceeding one-third of the penalty, shall be applied in relief of the local rate.

Having regard to the fact that a contrary practice has so long prevailed, I think costs should not be given against the prosecutor.

(1) [1895] 2 Q. B. at p. 67.

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WRIGHT, J. :—

I concur, and it is only necessary for me to say a word. I am clear that the general provisions in section 13 of the Fines Act (Ireland), 1851, and in section 22, sub-sect. 8, of the Petty Sessions Act, 14 & 15 Vict. c. 93, still regulate the application of penalties, the effect of which would be that prior to the Irish Education Act, 1892, a sum not exceeding one-third of the penalty might be awarded to the prosecutor, the remainder going to the Crown. By section 3, sub-sect. 5, of the Education Act, 1892, the expenses therein mentioned are to be defrayed out of the local rate, that is the poor rate, and any revenue from penalties under the Act is to be applied in relief of the local rate. That, translated into plain English, means that anything coming to the local authority from penalties is to be so applied. I agree in what has been said by my Lord as to section 26 of the Sale of Food and Drugs Act, 1875. That section shows that when the Legislature intended to give the entire penalty to the local authority, it did so in clear language. To give a similar effect to the sub-section now in question would be to reconstruct it, which we have no power to do. I think that the words "any revenue from penalties" mean whatever the local authority may get from penalties, that is the amount allowed by the Fines Act, viz. an amount not exceeding one-third of the penalty.

J. G. T.

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The prosecutors appealed to the Court of Appeal (The Lord Chancellor, and FitzGibbon and Holmes, L.JJ.).

Healy, K.C., Clancy, K.C., and *George C. Green*, for the appellants.

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the respondents.

The arguments were the same as in the King's Bench Division.

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THE LORD CHANCELLOR :—

This is a question arising on the Irish Education Act, 1892, of considerable importance to the County Council of Dublin, and which it is natural and right they should wish to have decided.

The Act brings in the principle of compulsory education in the case of children not less than six nor more than fourteen years of age, enforceable by proceedings against the parent. The power of enforcing attendance is vested in a School Attendance Committee, constituted in the manner provided for by the 3rd section of the Act, and it is carried out, as regards the enforcement, by a proceeding before a Court of Summary Jurisdiction, consisting of two Justices of the Peace; and the School Attendance Committee is authorized to proceed, in the events mentioned in sect. 4, sub-sect. 2, for the infliction of a fine on the parent not exceeding, including costs, 5*s*., which may be asked for again in event of continuing non-compliance.

The Act provides for a parliamentary grant in aid of education in elementary schools, applicable under the provisions mentioned in the 4th schedule to the Act. The mode of working the Act is fixed by the 3rd section—a School Attendance Committee for the place—the area of the local authority, and also, if the provisions of the sections are followed, for districts within that place.

Section 7 of the Act is the one which regulates legal proceedings. [His Lordship read the section.] Section 3 is the one on the construction of which the question turns. After providing for a School Attendance Committee for the place and district, sub-sect. 5 provides as follows :—"The expenses of a School Attendance Committee, and the salaries and expenses of their officers, shall be defrayed by the local authority out of the local rate, but any revenue from penalties under this Act, in the place or district, shall be applied in relief of the local rate."

The question is, whether "any revenue" means the whole penalty, or the portion coming to the School Attendance Committee as prosecutors.

In order to appreciate the section, we must have regard to the code which regulates the imposition of fines and penalties, *i.e.*, the Fines Act, 1851, 14 & 15 Vict. c. 90, sect. 13 : "In every case where the Act under which any penal sum shall be ordered to be

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paid as a penalty for an offence (and no sum shall be awarded to the complainant as compensation for damages) it shall be lawful for the Court to award any sum not exceeding one-third of such penalty to the prosecutor or informer, and the remainder of such penalty, and all other penalties, shall be awarded to the Crown, any Act or Acts to the contrary notwithstanding."

The 22nd section of the Petty Sessions (Ireland) Act, passed on same day, contains the same provisions as regards summary jurisdiction. To make the contentions of the appellants well founded, "any revenue" in sub-sect. 5 must mean the whole penalty all through the Act; but that cannot be when a penalty is given under sect. 2, and a fine of 40*s.* imposed, one-third of which goes to the common informer. They have no power either to get or apply what goes to the common informer; and, furthermore, the words are "revenue" in the place or district shall be applied.

The only way to make the whole Act work is to read "revenue" as "receipts"—what they get and can apply. There are no words strong enough in the section to alter the disposition from the Crown of the two-thirds of the penalty. What the local authority receives it is bound to apply in relief of the local rate. This is the substance and result of the construction put upon the section by the Judges of the King's Bench Division; and we are of opinion that their decision is right, and must be affirmed.

Under the special circumstances of the case we shall give no costs of the appeal.

FITZGIBBON, L.J.:—

The words of the Irish Education Act, 1892, sect. 3 (5)—"Revenue from penalties under this Act in the place or district,"—taken by themselves might be capable of either of two interpretations, viz.—(1) Income or receipts of the local committee derived from penalties under the Act; or (2) the money recovered from offenders in the place or district from penalties imposed under the Act, *i.e.*—*either* the receipts of the School Attendance Committee, *or* the total amount levied from offenders. On the words themselves, the first interpretation is, in my opinion, the most natural—every School Attendance Committee may derive

some revenue from penalties imposed under the Petty Sessions Act, to supply a subject-matter for the section; and the clause secures the application of that revenue in relief of the local rate, out of which the expenses of the Committee and their officers are to be defrayed under the same section. But the section does not purport to give any new or additional revenue to the Committee. It merely provides for the application of "any revenue" from penalties, the right to receive it being left dependent on the existing law, whatever that may be. The existing law is to be found in the Petty Sessions Act, and the Fines Act, 1851.

> "In every case where any penal sum shall be ordered to be paid as a penalty, it shall be lawful for the Court to award any sum not exceeding one-third of such penalty to the prosecutor, and the remainder of such penalty shall be awarded to the Crown, any Act or Acts to the contrary notwithstanding.
>
> "All penalties payable to the Crown shall be from time to time lodged in the Bank of Ireland by the several officers into whose hands the same shall come, as shall be directed by the secretary to the Lord Lieutenant."

School Committees may be prosecutors, and in certain cases are the only competent prosecutors, under the Education Act; but under sects. 2 and 6, offences are created, and penalties become payable on summary conviction, where the School Attendance Committee is not necessarily, and in some cases can not be, the prosecutor. It seems to me impossible to hold that the Court is debarred from awarding to a prosecutor other than an Attendance Committee, any portion of a penalty. If so, it is impossible to hold that all the money recoverable from penalties is, by section 3 (5) made "revenue," of the Attendance Committee. The same argument applies, with even greater strength, to exclude from that revenue the money which the Fines Act, in mandatory words, makes payable to the Crown, and of which the Secretary to the Lord Lieutenant is empowered to direct payment accordingly. The argument for the relator must go to the extent of showing that the Fines Act is impliedly repealed, or excluded, as to penalties under the Education Act. Repeal can not be implied unless there is repugnancy or inconsistency, and this rule is specially strict in the case of the Crown. But here I can find

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no repugnancy or inconsistency. The whole penal machinery of the Education Act is based on the Acts which regulate "summary convictions" in Ireland; and the result is, in my opinion, clear, viz.—"Any revenue" that comes under sect. 3 (5) must be derived by the Attendance Committee of the place or district from penalties under summary convictions, and such orders cannot award more than one-third of any penalties to the Committee. The remainder must be paid by the officers to the Crown; and the magistrates having no power to award more than one-third to the Committee, the direction to lodge the sums payable to the Crown, as provided by the Fines Act, was lawful and must be obeyed.

For my inability to comply with Mr. Healy's patriotic appeal to take this money away from the Crown in spite of the statute, I am consoled by the thought that Draconic magistrates will possibly be more lenient when they know that for every 6*s.* 8*d.* imposed in relief of the local rates, poor Irish parents must contribute at least 13*s.* 4*d.* to the Imperial Exchequer.

HOLMES, L.J.:—

This case depends upon the construction to be given to section 3, sub-sect. 5, of the Irish Education Act, 1892, which enacts that the expenses of a School Attendance Committee and the salaries and expenses of their officers shall be defrayed by the local authority out of the local rate, but any revenue from penalties under this Act in the place or district shall be applied in relief of the local rate. The object of the Act is to secure the attendance at school of every child between the ages of six and fourteen, subject to specified exceptions; and certain money penalties are prescribed for the purpose of enforcing this provision, which penalties may be recovered in summary proceedings before Justices by the School Attendance Committee appointed pursuant to sect. 3, but which may also, as far as I can form an opinion, be recovered by a private prosecutor, or informer. There is nothing in the statute providing the mode in which these penalties are to be allocated or to whom they are to be paid. This can only be ascertained by reference to other legislation; and by the Fines Act (Ireland), 1851, sect. 13, and the Petty Sessions (Ireland) Act,

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1851, sect. 22, sub-sect 8, it is enacted that where the Act under which any penal sum shall be ordered to be paid as a penalty for an offence, and no sum shall be awarded to the complainant as compensation for damage, it shall be lawful for the Court to award any sum not exceeding one-third of such penalty to the prosecutor or informer, and the remainder of such penalty shall be awarded to the Crown. There is nothing in the Act of 1892 to indicate that these provisions do not apply to the penalties thereby prescribed. It would have been easy to say that all the penalties recovered thereunder should be paid to the School Attendance Committee, or be applied in aid of the local rates. But this is not said; what is provided is that the expenses of the Committee shall be defrayed out of the local rate, but any revenue from penalties, meaning, as I understand the words, such portion of the penalties as the Committee are entitled to under existing statutes, shall be applied in relief of the local rates.

I am of opinion that neither the School Attendance Committee nor the local rate is entitled to receive out of the penalty any portion thereof, beyond what may be awarded to the Committee as prosecutor or informer—an amount that cannot exceed one-third. Therefore, the order of the Justices to pay the Committee the whole of the penalty is without jurisdiction. As a matter of procedure, the more regular course would probably have been to have this order quashed by means of a writ of *certiorari*; but it was agreed by both parties, for the purpose of saving expense, to have the question decided on the application for a writ of mandamus, and accordingly we hold that there is no ground for the issue of such a writ.

Solicitor for the prosecutors: *Wm. J. Shannon.*
Solicitor for the Crown: *Malachi Kelly.*

R. ST. J. C.

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1908.
Jan. 24.

MAC DONALD *v.* O'TOOLE (1).

Practice—Equitable execution—Receiver—Postal Service—22 Vict. c. 26 (Superannuation Act, 1859), ss. 10 and 11.

The Court will not appoint a receiver by way of equitable execution over future instalments of a superannuation allowance, granted under section 10 of the Superannuation Act, 1859, to a public servant, if such servant is, at the time of the application to appoint a receiver, under the age of sixty years.

Motion on behalf of the Postmaster-General to discharge an order of the King's Bench Division, made on December 2nd, 1907, and appointing a receiver by way of equitable execution of future instalments of a superannuation allowance granted to the defendant under section 10 of the Superannuation Act, 1859. The defendant, John O'Toole, was entitled to a superannuation allowance of £103 9*s.* 10*d.* per annum, payable by monthly payments. The order of December 2nd, 1907, restrained the defendant from receiving the moneys payable under the said "pension" and appointed Arthur Mac Donald, agent of the plaintiff, William Mac Donald, receiver over the "pension" of the defendant, and directed that his receipt for the gales of the said "pension" should be a sufficient discharge to the department or office making such payment. The said order further directed that the receiver should retain the sum of £1 10*s.*, out of each monthly payment, towards satisfaction of the judgment obtained in the action; and should upon receipt of each such payment pay over the balance thereof to the defendant. The defendant's wife appeared in person and was examined on the hearing of the motion of December 2nd, 1907, but the defendant was not otherwise represented; and the affidavit filed by the plaintiff stated that the defendant was entitled to a "pension" of £103 9*s.* 10*d.*, the plaintiff being then unaware of the facts as to the defendant's superannuation allowance and the circumstances relating thereto. These facts

(1) Before Palles, C.B., and Johnson, J.

appeared from the affidavit of R. A. Egerton, secretary to the General Post Office, Dublin, which affidavit was filed in support of the motion to discharge the order of December 2nd, 1907. The affidavit contained the following statements:—

"The defendant, John O'Toole, was an employee of the Post Office as a sorting clerk and telegraphist: he was in the Post Office service from March 26th, 1872, to May 11th, 1903, when he was compelled to retire owing to ill-health, and, being under sixty years of age, the necessary medical certificate under section 10 of the Superannuation Act, 1859, was furnished to the satisfaction of the Treasury, that he was incapable of discharging his duties owing to bodily infirmity, and that such infirmity was likely to be permanent.

"The defendant's services having rendered him eligible for the award of a superannuation allowance on retirement, the Post Office authorities recommended him to the Lords Commissioners of the Treasury for a pension; and he was awarded by their Lordships, on October 19th, 1903, a sum of £103 9*s.* 10*d.*, under the provisions of the Superannuation Acts. The pension or superannuation allowance is subject to the provisions of section 11 of the Superannuation Act, 1859.

"The defendant attained the age of fifty-one years on October 26th, 1907, and is, under section 11 of the aforesaid statute, liable, until he attains the age of sixty years, to be called upon to fill any public office or situation under the Crown for which his previous public service renders him eligible (1).

"It is submitted on behalf of the Postmaster-General that a pension given to an employee of the Post Office who is under the age of sixty years is not attachable, inasmuch as the pension is awarded to the pensioner for the purpose of enabling him to maintain himself pending his possible re-employment until he shall have reached the age of sixty years."

The present motion was brought on the suggestion of the plaintiff's solicitors, who stated in the course of a correspondence

(1) Sections 10 and 11 of the Superannuation Act, 1859, are cited at length in the judgment of Palles, C.B., *infra*, p. 389.

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with the Post Office authorities, that they would be obliged to take steps to enforce obedience to the order of December 2nd, 1907, unless the Postmaster-General took steps to have it discharged.

A. W. Samuels, K.C. (with him *Dudley White*), for the Postmaster-General:—

This superannuation allowance is granted in consideration of a liability for future services, and, therefore, cannot be attached: *Wells* v. *Foster* (1); *Waldron* v. *Croghan* (2); *M'Carthy* v. *Goold* (3); *Birch* v. *Birch* (4); *Crowe* v. *Price* (5). A pension granted as a reward solely for past services can be attached or assigned: *Wilcock* v. *Terrell* (6); *Murphy* v. *Green* (7); *Dent* v. *Dent* (8); but it has always been held on grounds of public policy that, where the annuitant or pensioner is liable to be called on to re-enter the public service, an allowance or pension granted in consideration of such liability cannot be attached or assigned. In *Picton* v. *Cullen* (9) it was held that a receiver could be appointed over an instalment of a national schoolmaster's salary when such instalment was actually due, but the principle for which I contend is not inconsistent with that decision.

Gerald Fitz Gibbon, for the plaintiff:—

There is no provision in the Superannuation Act, 1869 (22 Vict. c. 26), that an allowance granted thereunder cannot be assigned or taken in execution. The Act is silent as to the intention of the Legislature in this respect, although such a provision is to be found in other enactments of a similar nature, *e.g.*, in the Local Officers' Superannuation Act (Ireland), 1869 (32 & 33 Vict. c. 79), sect. 7, and in the Army Act, 1881 (44 & 45 Vict. c. 58), sect. 141, under which *Lucas* v. *Harris* (10) was decided. *Wells*

(1) 8 M. & W. 149.
(2) 7 L. R. Ir. 320.
(3) 1 Ba. & B. 387.
(4) 8 P. D. 163.
(5) 22 Q. B. D. 429.
(6) 3 Ex. D. 323.
(7) 26 L. R. Ir. 610.
(8) L. R. 1 P. & M. 366.
(9) [1900] 2 I. R. 612.
(10) 18 Q. B. D. 127.

v. *Foster* (1) and the other cases cited by counsel for the Post-master-General are distinguishable. In those cases the persons to whom pensions were granted were capable of serving if required to do so, but in this case the defendant is suffering from permanent disablement. In *Hamilton and Co.* v. *Coningham* (2) a committal order was made against an officer in the army for default in paying an instalment of a judgment debt, although he had no income beyond his pay. That case goes farther than *Picton* v. *Cullen* (3), and disposes of the question of public policy.

Dudley White, in reply:—

In *Picton* v. *Cullen* (3) the order applied only to an instalment then actually due, and the Commissioners of National Education did not intervene. It does not appear that, if they had done so, and objected to the order, the Court would have enforced it as against them. See the judgment of Fitz Gibbon, L.J., at p. 617 of the report. In *Manning* v. *Mullins* (4) the Court disclaimed making an order against the Paymaster's Department.

PALLES, C.B.:—

I am of opinion that the order appointing a receiver over the defendant's superannuation allowance must be discharged. It is not open to us to decide otherwise, and, if the authorities cited are to be discussed, they must be so discussed in the Court of Appeal. I do not wish to discuss the decisions on this point of the Court of Appeal in this country. They are all the more binding on me because one of my own decisions has been overruled by them: *Picton* v. *Cullen* (3); as to which I shall say no more than that I am supported in my error by the authority of Lord Esher, Lord Justice Fry, and Lord Bowen, in *Crowe* v. *Price* (5), which was not cited before our Court of Appeal.

(1) 8 M. & W. 149.
(2) [1903] 2 I. R. 564.
(3) [1900] 2 I. R. 612.
(4) [1898] 2 I. R. 34.
(5) 22 Q. B. D. 429.

K. B. Div. 1908. MacDonald *v.* O'Toole. Palles, C.B.

It has been admitted that the application, upon which the order before us was made, was to appoint a receiver over *future* instalments of a superannuation allowance, and that, by that order, a receiver has been appointed over future instalments; now *Picton* v. *Cullen* (1) deals only with *arrears* which had actually accrued due. It is, therefore, not an authority to support the order before us. I wish, however, to say this—that the present motion being an application to discharge an order made by a Divisional Court, we would not hear the motion were it not that it is admitted that, through ignorance of the facts, the question now raised was not brought under the notice of the Court which made this order. Having regard to that fact, and as no objection to our hearing the motion has been made, it is unnecessary to adjourn the motion with a view to its being brought before the Court which made the order, which I believe to be the normal and convenient course.

The principle upon which I base my judgment is that laid down by Lord Wensleydale, then Parke, B., in *Wells* v. *Foster* (2). He says: "The correct distinction made in the cases on this subject is, that a man may always assign a pension given to him entirely as a compensation for *past* services, whether granted to him for life, or merely during the pleasure of others. In such a case, the assignee acquires a title to it, both in equity and at law, and may recover back any sums received in respect of it by the assignor, after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some *continuing duty* or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable." That brings me to the two sections of the Superannuation Act, 1859, which have been cited. Sect. 10 applies to the superannuation of persons under the age of sixty years. It enacts that "it shall not be lawful to grant any superannuation allowance under the provisions of this Act to any person who shall be under sixty years, unless upon medical certificate to the satisfaction of the Commissioners of the Treasury that he is incapable, from

(1) [1900] 2 I. R. 612. (2) 8 M. & W. at p. 152.

infirmity of mind or body, to discharge the duties of his situation, and that such infirmity is likely to be permanent." Then follows sect. 11—"Every person to whom a superannuation or compensation allowance shall have been granted before he shall have attained the age of sixty years shall, until he has attained that age, *be liable to be called upon* to fill, in any part of Her Majesty's dominions in which he shall before have served, any public office or situation under the Crown, for which his previous public services may render him eligible."

The subject-matter of sect. 11 is co-extensive with that of sect. 10, so that it is clear that, though sect. 10 is an enactment made by reason of an opinion that the disablement will prove to be permanent, the Act legislates upon the basis that the disablement *may be* temporary, and that the person to whom the allowance is granted shall be liable again to be called on for the performance of duties in the public service, if in the course of time he shall become capable of fulfilling them. This interpretation of the statute brings the present case within the principle of *Wells* v. *Foster* (1); it is impossible to distinguish it on the ground put forward by counsel for the plaintiff, that in *Wells* v. *Foster* (1) the allowance was granted in consequence of a reduction of the establishment of the branch of the public service in which the defendant was then serving. We have the fact before us that the Crown still holds the defendant, O'Toole, liable to serve again if he shall become fit to do so, and if his services are demanded.

That, however, is not all. The very point which arises in this case came before Sir E. Sullivan, M.R., in *Waldron* v. *Croghan* (2), and he decided that, as the Prisons (Ireland) Act, 1877, incorporates the Superannuation Act, 1859, a pension granted under the former Act is not assignable. This decision was cited to the Court of Appeal in *Murphy* v. *Green* (3), and the members of that Court in four elaborate judgments based their decision expressly upon the ground that the Superannuation Act, 1859, did not apply to the case then before them. Were we to refuse this motion, we should act, not only against the decision of Sir E. Sullivan, M.R.,

(1) 8 M. & W. 149. (2) 7 L. R. Ir. 320. (3) 26 L. R. Ir. 610.

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but against the reasoning upon which the Court of Appeal decided *Murphy* v. *Green* (1).

The order before us must be set aside.

Johnson, J., concurred.

Solicitors for the plaintiff: *Moore, Keily, & Lloyd.*
Solicitor for the Postmaster-General: *E. R. Bate.*

(1) 26 L. R. Ir. 610.

PALMER *v.* BATEMAN (1).

(1907. No. 10,218.)

K. B. Div.
1908.
Jan. 30, 31.
Feb. 3.
Appeal.
April 30.
May 1.

Negligence—Nuisance—Highway—Owner of adjoining house—Gutter falling from roof.

The plaintiff was injured by a piece of the gutter from the roof of the defendant's house falling on her as she was passing along the street. The fall of the gutter took place owing to a screw having rotted. Evidence was given on behalf of the defendant that workmen had been periodically employed to examine and repair the gutter. There was no evidence that the defendant knew of its defective condition. The jury found that there was no want of reasonable care on the part of the defendant in maintaining the gutter, and that its fall was not occasioned by neglect or default on his part, and thereupon, by the direction of the Judge, found a verdict for the defendant:—

Held, that the defendant was entitled to retain the verdict.

Tarry v. *Ashton* (1 Q. B. D. 314) distinguished.

MOTION to set aside the verdict and judgment for the defendant, John Henry Bateman, or, in the alternative, for a new trial.

The action was brought to recover damages against three defendants, John Henry Bateman, Thomas Wesby Bateman, and Susan Bateman, the plaintiff's claim being, as stated in the indorsement on the writ of summons, "for personal injuries occasioned by the negligence of the defendants in permitting their house at Clonakilty, in the county of Cork, to be and remain in a dangerous condition, by reason whereof portion of said house fell, and injured the plaintiff." In the statement of claim it was alleged that the defendants, who were in possession of the house, "negligently failed to maintain the said house in proper repair, and allowed the same to become a danger to the public." The defendants, in their defence, traversed the alleged negligence.

The action was tried before Boyd, J., and a common jury of the City of Dublin, on the 10th and 11th December, 1907. Evidence

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

K. B. Div. 1908.

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was given on behalf of the plaintiff that on the 24th May, 1907, she was passing the defendants' house about 10 o'clock at night, when she was struck on the top of her head, and seriously injured, by a piece of the shoot or gutter, which fell from the eaves of the defendants' house. The gutter had fallen by reason of the snapping of a screw which had rotted. The house had been held in fee-simple by Henry Bateman, the father of the defendants John Henry Bateman and Thomas Wesby Bateman. Henry Bateman had carried on business in the house. He died intestate in 1906, leaving the defendant John Henry Bateman, his eldest son, then about twenty years of age, who continued to carry on the business in the house, assisted by his brother, the defendant Thomas Wesby Bateman. The defendant Susan Bateman was an aunt of the other defendants; and letters of administration to Henry Bateman had been granted to her as guardian.

One of the plaintiff's witnesses (a mason and contractor) stated on cross-examination that he had seen the house and gutters painted and cleaned every couple of years, and that as far as he could see the Batemans took every care of the house; that the town council of Clonakilty inspected the gutters and houses, and if they found a bad gutter witness got the job to replace it. The defendant John Henry Bateman, who was called and examined for the plaintiff, stated on cross-examination—"My father employed men to paint and repair the gutters and house. The year before his death this was done. The gutters were cleaned every year." Re-examined:—"The last man who painted and repaired the gutters was Michael Moynihan. He is here. He washed the gutters in 1906."

There was conflicting evidence as to whether the gutter had originally been properly constructed or not.

At the close of the plaintiff's case, Boyd, J., on the application of the defendants' counsel, held that there was no evidence that Susan Bateman was owner or occupier, and that she was not responsible. Counsel for the defendants also asked for a direction for Thomas Wesby Bateman, but the Judge refused to grant this at that stage of the case. Counsel for the defendants also asked for a direction for all the defendants, on the ground that there was no evidence of actionable negligence. Boyd, J., was of this opinion,

but considered it better to send the case to the jury and obtain their opinion, so as to avoid further litigation.

Witnesses were then called for the defendants, who deposed that the gutters of the house were cleaned out every year; that they had been examined in February, 1906, and May, 1906, and were then in good order. A man in the employment of the Urban District Council, whose duty it was to examine all the gutters in the town, deposed that he had examined the gutters in question, and that there was nothing wrong with them that he could see; that if there was anything wrong, or any dirt in them, it was his duty to report it, and require the work to be done.

Previous to counsel addressing the jury, Boyd, J., gave them a draft of the questions he intended to leave to the jury, which were the same as those subsequently left to them, and hereinafter set out. P. D. Fleming, K.C., on behalf of plaintiff, asked the Judge to submit the further question:—"Was the fall of the eave-shoot caused by (*a*) imperfect or improper construction, (*b*) its decayed condition?" The Judge declined to do so, inasmuch as it did not arise on the case made in the pleadings. No application was made to amend the pleadings. The Judge charged the jury, and explained to them that it was the duty of the owner or occupier of premises to take all reasonable precautions that his premises should be kept in a safe and proper condition, and that if he were guilty of negligence in keeping them in such a condition, he would be liable if injury resulted to anyone by reason of his neglect. At the close of the charge, and when the jury had retired to consider their verdict, Fleming, K.C., handed in the following objection:—"I object to your Lordship's direction to the jury—(1) That the onus did not lie on the defendants to disprove negligence; (2) that it lies on the plaintiff to prove negligence. I ask your Lordship to direct the jury that the burden of proof is on the occupier of the premises, namely, the defendants, and not on the plaintiff."

Boyd, J., in his report, stated:—"I did not state to the jury as alleged in this requisition. What I did say was that in most cases of negligence it lay upon the plaintiff to give affirmative proof of negligence, but that in some cases the happening of the occurrence itself was sufficient; and I drew their attention to the fact that the plaintiff did not rest her case solely on the fact of

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the falling of the gutter, but gave evidence of its defective construction, and that the defendants had given evidence of the absence of negligence on their part, and it lay upon the jury to decide on the whole of the circumstances in this case whether the defendants were guilty of negligence."

The following were the questions left to the jury, with their answers:—

1. Did the defendants omit to use reasonable and proper care in the maintenance and preservation of the gutters of the house? *Answer*—No.

2. Was a fall of a portion of the gutter caused by neglect or default on the part of defendants? *Answer*—No.

3. What damages, if any, is the plaintiff entitled to? No answer.

Upon these findings the jury found for the defendants by the direction of the Judge, and the Judge gave judgment for the defendants, with costs.

Ignatius J. O'Brien, K.C. (with him *P. D. Fleming, K.C.*, and *M'Sweeney*), for the plaintiff:—

Where injury is caused by the falling of an object into the highway from a building, the occupier of the building is liable, unless he can show that the accident was due to some cause consistent with the due repair and careful management of the structure: Pollock on Torts, 8th ed., p. 517; *Tarry* v. *Ashton* (1); *Byrne* v. *Boadle* (2); *Kearney* v. *London and Brighton Railway Co.* (3); *O'Gorman* v. *Higgins* (4). In the present case the fall of the gutter was owing to its being out of repair. The fact that the defendant employed a competent person to put the gutter in repair is not sufficient to exonerate him from liability: *Tarry* v. *Ashton* (1); *Hyman* v. *Nye* (5). If a house adjoining a highway is out of repair, this constitutes a nuisance, and the occupier is liable to a person suffering damage in consequence: *Reg.* v. *Watson* (6); *Hadley* v. *Taylor* (7); *Quarman* v. *Burnett* (8). We do not contend

(1) 1 Q. B. D. 314.
(2) 2 H. & C. 722.
(3) L. R. 6 Q. B. 759.
(4) 3 Ir. Jur. (N. S.) 327.
(5) 6 Q. B. D. 685.
(6) 2 Ld. Raym. 856; 1 Salk. 356.
(7) L. R. 1 C. P. 53.
(8) 6 M. & W. 499, at p. 510.

that the defendant absolutely insures the house to be safe. The duty is what is called by Pollock a "limited duty of insurance": Pollock on Torts (8th ed.), p. 508. We admit that defendant would not be liable for a nuisance caused by the wrongful acts of third parties unknown to defendant: *Silverton* v. *Marriott* (1). But that is not the present case.

Moriarty, K.C., and *A. M. Sullivan*, for the defendant:—

The defendant is not an insurer of the safety of the building in the sense of being responsible for injury no matter how occasioned. The only duty cast on him is to take every reasonable precaution: *Hughes* v. *Percival* (2). The present action is founded, and necessarily founded, on negligence; the jury have negatived negligence, and there was evidence to support their finding. The action is not for nuisance, nor could such an action be sustained. The mere fact that a piece of gutter falls from the roof of a house, and injures a passer-by, is not sufficient to establish a case of nuisance. In *Kearney* v. *London and Brighton Railway Co.* (3) it was not attempted to base the action on nuisance. *Tarry* v. *Ashton* (4) is distinguishable. There the defendant knew of the dangerous condition of the lamp. All that that case decides is that if the occupier of a house knows of the existence of a nuisance, he cannot escape liability merely by employing a contractor to put the matter right. Blackburn, J., bases his judgment on the defendant's knowledge of the nuisance, and this view was not dissented from by the other Judges. The view of Blackburn, J., was approved in *Silverton* v. *Marriott* (1). In the present case there is no evidence that the defendant knew the gutter to be out of repair. [They also referred to *Ivay* v. *Hedges* (5); *Burrell* v. *Tuohy* (6); *Hanrahan* v. *Ardnamult Steamship Co.* (7); *Robertson* v. *The Amazon Tug and Lighterage Co.* (8).]

P. D. Fleming, K.C., in reply.

Cur. adv. vult.

(1) 59 L. T. (N. S.) 61.
(2) 8 App. Cas. 443, at p. 455.
(3) L. R. 6 Q. B. 759.
(4) 1 Q. B. D. 314.
(5) 9 Q. B. D. 80.
(6) [1898] 2 I. R. 271.
(7) 22 L. R. Ir. 55.
(8) 7 Q. B. D. 598.

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PALMER v. BATEMAN.

Feb. 3.

LORD O'BRIEN, L.C.J. :—

The plaintiff, Mrs. Palmer, was passing through a street in the town of Clonakilty, when a piece of the gutter of a house fell on her and injured her. She has brought an action against the owner of the house to recover damages for such injury. Let me see what is the nature of her action. In the indorsement on the writ of summons, the plaintiff's claim is stated to be for "personal injuries occasioned by the *negligence* of the defendants by permitting their house at Clonakilty, in the County of Cork, to be and remain in a dangerous condition, by reason whereof portion of said house fell and injured the plaintiff."

That sounds in negligence. It not alone sounds in negligence, but the express basis of the action is negligence. I turn to the statement of claim. The third paragraph alleges that the defendants who were in possession of the house "negligently failed to maintain the said house in proper repair, and allowed the same to become a danger to the public." The words are "*negligently* failed to maintain." Thus we have negligence expressly alleged in the indorsement on the writ, and in the statement of claim. And while referring to the pleadings, let me say that they are, in my opinion, correctly drawn.

The action then is based on negligence, not on nuisance. The form of a count in nuisance is quite different, as a reference to Bullen and Leake will show. In the present case nuisance is not alleged as a cause of action, nor, in my opinion, could it have been.

Mr. Fleming's requisitions, which the judge rightly refused to comply with, were entirely inconsistent with the character of the case. These requisitions purported to deal with the case as one of nuisance, whereas the case was both in substance and in form one resting upon negligence. Nuisance was not complained of; and if it had been, it would have been wholly inappropriate.

What did occur? A piece of the gutter of a house fell upon a passer-by and injured her. The gutter is part of a house—if not part of a house, it is a necessary appendage to a house. Certainly the house in its original construction with gutter attached, did not constitute a nuisance; and I think it is equally certain that when a piece of the gutter fell, it was not a nuisance. No doubt

if a house abutting upon a highway is in such a conspicuously tumble-down condition that its very existence is fraught with obvious danger to the public, it may be regarded as a nuisance and pulled down, or its owner may be indicted for a nuisance. If, said Lord Blackburn, in *Tarry* v. *Ashton* (1), the defendant knowingly maintained his house in a dangerous state, he would be indictable for the nuisance. But in all common sense could any such description apply to the defendant's house; and there is no evidence whatever that the defendant knew about the conditon of the gutter.

I don't think it can be said that the owner of a house warrants to each member of the public that it is in an absolutely safe condition of repair; but if there be negligence in the keeping of the house in repair, and such negligence results in an injury to a member of the public, that is a wholly different thing. Indeed I think the case of *Kearney* v. *London, Brighton, & South Coast Railway* (2), both in the Court of first instance, and on appeal, concludes this case. There a brick fell out of a bridge and injured a man who was passing by. It was never suggested for a moment that this was a case of nuisance. It was dealt with as a case of negligence. No doubt if a piece of a gutter falls upon the head of a passer-by this is evidence of negligence—*res ipsa loquitur*—and the onus of proof becomes shifted; and if there was nothing else in the case, a jury would be justified in finding a verdict for the plaintiff. But the mere happening of an accident is not conclusive proof; and if there be evidence on both sides, the question must be submitted to a jury. *Tarry* v. *Ashton* (1) does not at all conflict with this view. The point decided in that case was, that the owner of a house, which, to his knowledge, was in a dangerous condition, could not free himself from responsibility by employing a contractor who was apparently competent, but failed to put things right; and the case in Lord Raymond does not, in my opinion, assist, because it proceeds on the assumption that the house therein referred to was in such a condition as to be a nuisance, and only decided that a tenant at will could be made responsible for its condition.

(1) 1 Q. B. D. 314. (2) L. R. 5 Q. B. 411; L. R. 6 Q. B. 759.

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MADDEN, J. :—

I am of the same opinion. The action was both in substance and in form one of negligence. It was so pleaded, and there was nothing in the facts of the case which would have justified the pleader in putting it in any other light, or resting it on nuisance. I have nothing to add to the judgment of my Lord.

WRIGHT, J. :—

I concur, and have only a word or two to add. The action was not merely in form but in reality one of negligence. A portion of a house fell upon the plaintiff, who was passing by about 10 o'clock at night. She was struck on the head, and undoubtedly sustained serious injury. Mr. Fleming has based the liability of the defendant upon a passage from Pollock on Torts : "Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable" : Pollock on Torts (8th ed.), p. 517. I agree that the falling of the object was *prima facie* evidence of negligence, so as to cast upon the defendant the onus of showing that there was no negligence on his part.

In the present case, however, the defendant has given evidence to rebut this *prima facie* evidence of negligence arising from the fact of the accident.

The main reliance of the plaintiff is on the case of *Tarry* v. *Ashton* (1). Judgments in that case were delivered by Blackburn, Lush, and Quain, JJ. It is not right to say that Blackburn, J., was a dissenting Judge. The decision was the unanimous decision of the Court, although different grounds are stated in the several judgments. The judgment of Blackburn, J., is well worthy of consideration. He says :—"It appears that the defendant came into occupation of a house with a lamp projecting from it over the

(1) 1 Q. B. D. 314.

public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state, he would then be indictable for the nuisance." He then goes on to consider the case of *Reg.* v. *Watson* (1).

The point of the decision in *Tarry* v. *Ashton* (2) is that the defendant several months before the happening of the accident knew that this lamp which projected over the street was in a dangerous state; that he called in a contractor to put the lamp in repair, but that the contractor failed to do so. The judgment of all three members of the Court is that the defendant, with knowledge of the defect, could not escape liability by shifting responsibility on to the shoulders of the contractor. Blackburn, J., in another part of his judgment says:—"I do not wish to decide more than is necessary; and if there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrong-doer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable. But if he did know of the defect, and neglect to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down."

We have not been referred to any case in England or Ireland where an innocent occupier of a house has been held liable under such circumstances as existed in the present case. The case of *Tarry* v. *Ashton* (2) has been frequently referred to in subsequent cases, but generally as deciding, as in *Hardaker* v. *Idle District Council* (3), that the defendant cannot relieve himself from liability by showing that he employed a contractor. The case is also referred to in *Silverton* v. *Marriott* (4), where Field, J., quotes the passage from the judgment of Blackburn, J., which I have just read, as laying down the correct principle.

(1) 2 Lord Raymond, 856.
(2) 1 Q. B. D. 314.
(3) [1896] 1 Q. B. 335.
(4) 59 L. T. (N. S.) 61.

K. B. Div. 1908. PALMER *v.* BATEMAN. Wright, J.

It would be contrary to principle and to common sense to hold that a person in the position of the defendant, who had just come into possession of a house, knowing nothing of this defect, and trusting to the ordinary supervision by workmen, which appears to have taken place every year or every two years, should be held liable for an accident happening in this way. I agree with my Lord that the occupier does not warrant his house to be safe in every particular, so as to make him liable if a slate falls off, without any want of care on his part, and causes injury to a person passing by.

I am of opinion that Mr. Fleming was not entitled to have the further questions mentioned in his requisition left to the jury. I think that the proper questions were left to the jury, and that the verdict and judgment for defendant must stand.

J. G. T.

Appeal. April 30. May 1.

The plaintiff appealed (1).

The Court of Appeal dismissed the appeal with costs.

Solicitor for the plaintiff: *P. J. M'Carthy.*
Solicitor for the defendant: *P. W. O'Donovan.*

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ GIBBON and HOLMES, L.JJ.

THE ATTORNEY-GENERAL *v.* ROSS (1).

K. B. Div.
1908.
Feb. 11, 18.

Revenue—Stamp—Receipt—Stamped receipt for two sums—Contemporaneous unstamped receipt for one of such sums—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 101, 103.

The defendant gave N. a duly stamped receipt for a sum paid by N. for rent and goods supplied, and at the same time gave N. (for book-keeping purposes) a separate document purporting to be a receipt for the rent alone, which exceeded £2:—

Held, that the latter document did not require a stamp.

MOTION to set aside the judgment entered at the trial for the defendant, and to enter judgment for the informant.

This was an information on the Revenue side by the Attorney-General to recover penalties from the defendant for having given to one Thomas P. Nolan certain receipts liable to duty and not duly stamped. The information was tried by Gibson J., without a jury. It appeared at the trial that Joseph Ross, the defendant's father, let certain premises at Dundrum, Co. Dublin, to Thomas P. Nolan at £38 per annum, payable by £3 3*s.* 4*d.* per month in advance. Ross used to supply Nolan with milk, butter, &c., the amount due for these being paid by Nolan monthly at the same time as the rent. A detailed account for goods and rent was sent to Nolan monthly, and he paid the amount by cheque. It was alleged by the defendant, but this was denied by Nolan, that, on payment, this account was duly stamped and receipted. At the same time, for book-keeping purposes, a separate receipt for the rent was passed to Nolan, such document not being stamped. It was in respect of these unstamped documents, which were given by the defendant, acting for his father, that the penalties were sought to be recovered. On the trial before Gibson, J., the only question raised was one of fact, viz., whether or not stamped receipts for the composite amount paid in

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and WRIGHT, JJ.

K. B. Div. 1908. ATTY.-GEN. *v.* ROSS.

respect of rent and goods were passed as alleged by the defendant. Gibson, J., concluded his report of the trial as follows:—"It being conceded (as I understand) that if stamped receipts covering the rent were passed, no penalties would be recoverable in respect of the documents produced, which, though on their face purporting to be receipts, were not, in that view, in truth and fact receipts, I found for the defendant, as I thought on the whole his account more probable, and I entered judgment with costs accordingly."

Molony, K.C. (with him *Serjeant O'Connor, K.C.*, and *Coll*), for the Crown:—

The admission at the trial is not binding here, being an admission not of fact but of law. We contend now that even admitting that the composite receipt for the sum paid in respect of rent and goods was duly stamped, the separate acknowledgment of the payment of the rent is a receipt, and must also be stamped. By sect. 101, sub-sect. 1, of the Stamp Act, 1891, receipt includes "any note, memorandum, or writing whereby any money amounting to £2 or upwards, . . . is acknowledged or expressed to have been received, or deposited, or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of £2 or upwards is acknowledged to have been settled, satisfied, or discharged." The document in question clearly comes within the words of the sub-section. The principle of all fiscal legislation is that, if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to be: *Partington* v. *The Attorney-General* (1), per Lord Cairns. It is not open to the Court to narrow down the operation of the Act by considerations of hardship: *Attorney-General* v. *Carlton Bank* (2), per Lord Russell, C.J. The law upon the subject of stamps is altogether a matter *positivi juris*. It involves nothing of principle or reason, but depends altogether on the language of the Legislature: *Morley* v. *Hall* (3), per Taunton, J. To justify the defendant's construction, the word

(1) L. R. 4 H. L. 100, at p. 122. (2) [1899] 2 Q. B. 158, at p. 164.
(3) 2 Dowl. 494, at p. 497.

"any" must be struck out of the sub-section, when it occurs before the words "note, memorandum, or writing."

Henry, K.C. (with him *W. H. Brown*), for the defendant:—

The receipt referred to in sect. 101, sub-sect. 1, is the document intended as the voucher or acquittance. If this is stamped, it is sufficient. If, at the same time, another document is given, merely for book-keeping purposes, as here, this does not require a stamp. Suppose a stock-broker writes to a customer acknowledging the receipt of money, and enclosing a formal stamped receipt, and also a statement of account showing the different receipts and payments; if the contention on the other side is right, not only would the formal receipt require a stamp, but also the letter enclosing it, and the statement of account.

[He referred to *Day* v. *Glaister* (1); Stamp Act, 1891, sect. 72; sect. 103, sub-sect. 3.]

Molony, K.C., in reply, referred to *General Council of the Bar (England)* v. *Inland Revenue Commissioners* (2).

Cur. adv. vult.

Feb. 18.

LORD O'BRIEN, L.C.J.:—

The question for our decision in this case is certainly a very narrow one. It is this: That when a receipt for rent and goods—a composite receipt—has been given duly stamped, should another document, merely because it purports on the face of it to be a receipt for the same rent—for the rent only—be stamped also? The defendant had a man named Nolan as his tenant, and supplied this Nolan with vegetables. Nolan sent him one sum, covering both the amount of the rent and the price of the vegetables, and Ross, the defendant, sent him for this a composite receipt, which for the purposes of the case must be assumed to have been duly stamped, and sent also simultaneously what purported to be a receipt for the rent, without a stamp. Is he liable to be sued for penalties by reason of the last document not having been stamped? The question depends on the true construction of the Stamp Act,

(1) 2 F. 963. (2) [1907] 1 K. B. 462.

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1891, sect. 103, clause 1. When construing this section, we must remember that the Act in which it is embodied is a Taxing Act imposing penalties for non-compliance with its provisions. If any reasonable construction of the relevant section would point to the subject not being taxable in the way suggested, that construction should be adopted. It appears to me a most reasonable construction to place upon the section, to hold that the word "receipt" in the section meant the primary effective receipt—the receipt which gave an acquittance for money paid. The primary receipt, and the primary receipt alone, in my opinion, had this effect. The second document was not intended as a voucher for the rent—was not given or received to vouch payment of the rent, but was passed merely, as was sworn, for book-keeping purposes, to keep the rent account distinct in itself, so as not to be mixed up with the goods account.

I asked Mr. Molony during the argument whether, if a properly stamped receipt was given and lost, and another receipt got to supply its place, should the latter be stamped. Mr. Molony, rightly, in my opinion, replied No, if the word "copy" was written on the second so-called receipt. But did not this answer involve that the only effective receipt was the first receipt that was properly stamped? Does not this answer, which I think was quite right, involve this, that a copy of a receipt is not to be stamped when the original has been properly stamped? The matter is certainly not to depend on the mere accident whether the word "copy" is written on the second document. The determining factor, in my opinion, is whether the second document, though purporting to be a receipt, is, in fact, a mere copy or not. Here the second document was, in truth and fact, so far as a receipt for rent was concerned, a mere copy. But what would the argument on the part of the Revenue Authorities involve? That no matter how many copies might be asked for, each copy should bear a stamp. That, in fact, in this way manifold the amount of duty mentioned in the statute might be exigible. That the subject might be taxed in respect of a single payment not merely one sum as duty, but perhaps many times that sum. This appears to me to be an unreasonable construction of the statute; and, therefore, I am of opinion that this motion should be refused with costs.

The view we have taken is in accordance with the practice which has hitherto obtained.

ANDREWS, J.:—

This was an information by the Attorney-General against William Richey Ross to recover the penalties imposed by the 103rd section of the Stamp Act, 1891 (54 & 55 Vict. c. 39), for giving a number of receipts liable to duty and not duly stamped. It appears in effect from the facts found by the learned Judge by whom the information was tried that the transactions out of which the claim for penalties arose were of the following character:—Joseph Ross, father of W. R. Ross, the defendant (who acted as his manager), let certain premises to one Thomas P. Nolan at a yearly rent of £38, payable monthly, by £3 3*s.* 4*d.* each month; and also in each month supplied Nolan with milk, butter, vegetables, and other produce. An account was settled between them in each month, in which the £3 3*s.* 4*d.* for rent and the sums due for the goods supplied were charged against Nolan, and the total amount so found due by him was discharged by his cheque. The account was then receipted, with a proper stamp affixed. Contemporaneously with each stamped receipt on the account, a separate unstamped signed document was given to Nolan, in the form of an ordinary receipt for the £3 3*s.* 4*d.* for rent. These unstamped documents were given by the defendant, W. R. Ross, who acted for his father, and the penalties sought to be recovered by the information are in respect of these unstamped documents, in the form of receipts for the rent, each of which was expressed to be for a sum exceeding £2. Upon these facts the question to be determined is, were these unstamped documents "receipts liable to duty" within the meaning of section 103, sub-section 1, of the Act? Each monthly account included the £3 3*s.* 4*d.* for rent, and the stamped receipt upon it was a receipt for the rent as well as for the amount due for the goods, and was not the less a receipt for the former because it was also a receipt for the latter. It was a receipt for both. The transaction was one entire transaction, in which a total sum was ascertained in one account between the parties to be due for both

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rent and goods, and a stamped receipt was thereupon given for the payment by cheque of this total sum.

I do not think it was the intention of the Act that two duties should be paid in respect of the receipt for the payment of one and the same sum. The contemporaneous document in the form of a receipt for the rent was a part of the entire transaction in which a stamped receipt was given for a sum which included the rent. I think it was merely a fuller signed statement of the item of £3 3*s.* 4*d.* in the account for which a stamped receipt had been already given; and if this fuller statement of the item of £3 3*s.* 4*d.* had been written at the foot of the account, the receipted account would not, in my opinion, have thereby become liable to an additional stamp, as the ascertainment and payment of, and the receipt for, the total sum due would still have been one entire transaction; and as the unstamped document was given contemporaneously with the receipted account, I do not think it material that it was written on a separate piece of paper.

When the defendant gave the unstamped document, I, therefore, think he cannot be held to have given "a receipt liable to duty" within the meaning of sect. 103, sub-sect. 1, of the Act; for the proper duty had been paid by the stamped receipt on the account which included the item of £3 3*s.* 4*d.* The Act is a Taxing Act, and ought not to be construed as imposing a second liability to duty in respect of the same transaction, unless it has clearly done so. By the 1st section of the Act the stamp duties made payable are those specified in the first schedule. The duty payable on a receipt is stated in the first schedule as follows:—"Receipt given for or upon the payment of money amounting to £2 or upwards, £0 0*s.* 1*d.*" I think this indicates that one duty only is payable in respect of one receipted payment. Sections 101, 102, and 103 of the Act, dealing with "receipts," appear to me also to indicate that one duty only is payable in respect of one receipted payment.

The information does not make any claim in respect of the unstamped documents in question as "duplicates or counterparts," as to which see sect. 72 of the Act, and the first schedule. It claims penalties for giving them as unstamped "receipts," under sect. 103, sub-sect. 1, which refers only to original instruments,

and it is not applicable to "duplicates or counterparts," and I do not find any penalty imposed by the Act for giving an unstamped duplicate, even if the unstamped documents in question are to be regarded as duplicates.

I think the case of the Crown for recovering penalties in respect of the unstamped documents in question has failed, and that the judgment for the defendant ought not to be disturbed. The motion to change the judgment must, therefore, be refused.

WRIGHT, J.:—

I concur. It must be admitted that the document in question, which the plaintiff contends is liable to stamp duty as a receipt, comes within the definition of a "receipt" in sect. 101 of the Stamp Act, 1891, 54 & 56 Vict. c. 39. But it has been found by the learned Judge who tried the case—a finding which has not been quarrelled with—that on each occasion when rent was paid two receipts were given: one for rent and goods, a general receipt when the account for both was paid, which bore a penny stamp in accordance with the Act, and the other for rent alone, which was unstamped. These two documents, according to the evidence, were part of one and the same transaction. The first document in itself was an acquittance to the tenant as against the landlord for the amount mentioned in it, which amount included the rent. The other document was given, not as an acquittance or voucher which might be used before some other person or body, *e.g.*, the rates department, in which case probably a different view might be taken, but was given to be used for purposes of book-keeping. It is not easy to accept this explanation, but I am bound by the finding of the Judge that on each occasion there was issued, in addition to the stamped receipt, a separate unstamped document, which for the purpose of receipt or acquittance as against the creditor was unnecessary. I may cite, as applicable to the question before us, the words of Lord Russell of Killowen in *The Attorney-General* v. *Carlton Bank* (1), where he speaks of "multiform invoices used by the clerks in large shops . . . intended merely for the regulation of book-keeping, and not

(1) [1899] 2 Q. B. at p. 165.

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regarded as documents of acquittance to the clerk, who hands over the money," which, of course, would not be liable to stamp duty.

But further, it must be borne in mind that this is a Revenue Act, and that we ought not to make the subject pay a double debt unless the language of the Act clearly expresses such an intention. In the oft cited case of *Tomkins* v. *Ashby* (1), Lord Tenterden, C.J., says, "Acts of Parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature." Here the defendant, as the Judge has found, on each occasion issued a receipt properly stamped, an acquittance to Nolan as against his landlord. That, in my judgment, was the limit of his liability—that discharged his obligation to the Revenue. It is not within the language or true meaning of the Act of 1891 to hold that the separate document passed on each occasion, recording the payment of the rent, is also liable to bear a stamp.

For these reasons, applied to the findings in fact of the Judge, I concur that judgment should be for the defendant.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitor for the defendant: *Gerald Byrne.*

J. G. T.

(1) 6 B. & C. 541.

M'CONNELL, APPELLANT; BRENNAN, RESPONDENT (1).

K. B. Div. 1907. Dec. 20, 21. 1908. Jan. 13.

Gaming—Using premises for betting—Proof of bet on one occasion only—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

A police constable (acting under instructions) went into the appellant's shop, and there made a bet with him of two shillings on a horse-race. The constable deposited the two shillings with the appellant, and gave him a piece of paper on which was written the amount of the bet and the name of the horse:—

Held, not sufficient evidence to justify the conviction of the appellant under section 3 of the Betting Houses Act, 1853.

Per L. C. O'Brien, L.C.J.: The mere naked fact, without more, that a bookmaker made one bet in a house in which he resided is not enough to attach to the house the character of a betting establishment.

Per Gibson, J.: In certain circumstances a single bet in a house or place accepted by the person using same, without any proof beyond the transaction itself, and the conduct and language of the parties, might warrant an inference of guilty user.

CASE STATED under 20 & 21 Vict. c. 43 by Mr. Swifte, Divisional Magistrate of the Dublin Metropolitan Police District, from which the following facts are taken:—

The appellant was charged on summons on the complaint of Police Inspector William Brennan for that on the 24th November, 1906, at 139, Upper Rathmines, being a person using the shop and premises at the above address, he did on said date use same for the purpose of money being received by him as the consideration of an implied agreement to pay money thereafter on a contingency relating to a horse-race, contrary to the form of the statute in such case made and provided.

The case was heard before Mr. Swifte, when the following evidence was given on behalf of the complainant:—

Constable John Cronin (29 E) deposed: "I know M'Connell's shop in Upper Rathmines, where defendant and his brother William do business at No. 139. On the 24th November I went there by

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, J.

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direction of Inspector Brennan, between 1 and 2 p.m. Defendant was outside his shop-door. I said, 'A fine day, Joe.' I knew him. We walked in together. I asked him what was the good thing for the big race (meaning the Manchester November Handicap). I wanted to put two shillings on the horse 'Cherry Ripe' to win. Defendant said it would be a very open race. I gave defendant a two-shilling piece and a piece of paper on which was written '2*s.* Cherry Ripe win.' I made a copy of it beforehand and initialled it (produced). Defendant put money and paper in his pocket, and said, 'Perhaps you have the right one'; Cherry Ripe was announced in the papers to run that day, and did run that day according to the papers. I visited defendant's place later that day with Inspector Brennan. I was in uniform."

Inspector William Brennan deposed: "Under my directions Police Constable 29 E visited M'Connell's place on the 24th November, 1906. In consequence of a report that constable made to me, he and I went to M'Connell's shop between 1 and 2 p.m. I then saw the defendant inside the shop. A man was talking to him. On seeing me they approached the door. The unknown man went hurriedly out. Joseph M'Connell went upstairs: opened a door, went through it and closed it. Before he disappeared I called out, 'Mr. M'Connell, come back; I want to speak to you.' He must have heard me, as I called out very loud. His brother William came in, and I asked the constable if he was the man he made the bet with; he said, 'No, it was his brother Joe.' After a time defendant came up from a sort of cellar and said, 'Is it me you want?' I then got the police constable to repeat the whole transaction he had with defendant in his presence. He did so. When the constable was done, I said to Mr. M'Connell (defendant), 'You have heard this statement now made by the constable.' Defendant made no reply. I then said, 'I demand the slip the constable states he has given you.' Defendant replied, 'I haven't got it on me.' I said, 'Do you refuse to give me that slip?' He said again, 'I haven't got it on me; you can search me if you wish.' I then told him I'd report the case for accepting bets on horse-racing in his house, and for using his premises for the purpose of betting. He made no reply. His brother William was present . . . I see in the *Independent* of the 24th November, 1906" (produced),

"the name of 'Cherry Ripe' as a probable starter in the Manchester November Handicap." On cross-examination by the Hon. Cecil Atkinson (for defendant), the Inspector said, "Defendant's brother's name is over the shop. I did not examine the valuation lists to see who is the occupier. Defendant and his brother live together in Upper Rathmines. I believe defendant works for the brother. His brother William told me he was the occupier of that house."

Mr. Swifte found all the statements of the above witnesses true as matters of fact.

No witnesses were examined on behalf of the defendant. Two defences were relied on: 1st, that the fact of making one casual bet did not, in the absence of proof that the premises had been previously at any time used as a betting-house, afford grounds to support a conviction under the statute (16 & 17 Vict. c. 119); and, 2ndly, that the defendant was not, on the evidence, a "user" or "occupier" or "keeper" of the house in question within the meaning of the Act.

As to the point made that the defendant was not the occupier of the premises, Mr. Swifte, in a written judgment delivered by him, and referred to in the case, stated—"It may, perhaps, be noted that the defendant is not by the summons charged as being the 'occupier' of the house, but as 'a person using the shop and premises.' If, however, it were necessary to show that the defendant was occupier, I think that there is *primâ facie* evidence that he was at any rate an occupier. The constable deposed that the two brothers 'do business' there." From this evidence, and from the fact that the defendant's brother was not called as a witness for the defence, Mr. Swifte stated that he was as a juror prepared to find "that the defendant is, I will not say the occupier, but in occupation of these premises jointly with his brother." He further stated: "So far as the question now before the Court turns upon whether the defendant, M'Connell, is a bookmaker or not, I have no difficulty in finding on the facts that he is, though possibly not a professed or professional one." Mr. Swifte further stated in his judgment that the primary business of the defendant was said to be that of an ornamental plasterer.

Mr. Swifte ruled against the contention of the defendant's counsel on both the points made, and convicted the defendant;

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but on his application stated the present case, requiring the judgment of the Court as to whether he was correct in point of law in his determination.

The Hon. Cecil Atkinson, for the appellant:—

The making of a single bet on the premises is not sufficient to support a conviction under sect. 3 of the Betting Houses Act, 1853. There must be a habitual user: *Whitechurch* v. *Fincher* (1); *The Queen* v. *Davies* (2); *Martin* v. *Benjamin* (3). What is intended to be prohibited by the Act is, not the making of a bet, but the conducting of the place as a betting-house: *Powell* v. *Kempton Park Racecourse Co.* (4), *per* Lord Halsbury, L. C. (pp. 159, 161); *per* Lord James (pp. 192, 196); *per* Lord Hobhouse, 173. [He also referred to *Eastwood* v. *Miller* (5); *Reg.* v. *Preedie* (6).]

The use must be a use by some one having the dominion and control over the place: *Powell* v. *Kempton Park Racecourse Co.* (4); *per* Lord Halsbury, L.C. (p. 160). Here the respondent had no interest in the premises; they belonged to his brother.

Dudley White (with him *The Solicitor-General, Redmond Barry, K.C.*), for the respondent:—

The question depends on the quality, not the quantity, of the user. What is to be considered is the character of the use, not the fact that it is repeated or designed, as distinguished from casual or infrequent: *Powell* v. *Kempton Park Racecourse Co.* (4), *per* Lord Halsbury, L.C. (p. 160). It is not necessary to show that the house was, previously to the occasion in question, used for the purpose of betting: *Reg.* v. *Preedie* (6); *Powell* v. *Kempton Park Racecourse Co.* (4), *per* Lord Halsbury, L.C. (p. 164). Taking all the circumstances of the case, coupled with the fact that no witnesses were called on behalf of the appellant, there was evidence to justify the magistrate in convicting: *Rex* v. *Corrie and Watson* (7).

Cur. adv. vult.

(1) 7 Cox C. C. 70.
(2) [1897] 2 Q. B. 199.
(3) [1907] 1 K. B. 64.
(4) [1899] A. C. 143.
(5) L. R. 9 Q. B. 440.
(6) 17 Cox C. C. 433.
(7) 68 J. P. 294.

Lord O'Brien, L.C.J. :—

This case involves a question mainly of fact. The question is, whether the evidence before the magistrate could reasonably show that the shop and premises referred to were being used for the purpose of betting—were, in fact, a betting-establishment. But, in the first instance, as there is some confusion in the public mind on the subject, let me see what is forbidden by the Act of Parliament, 16 & 17 Vict. c. 119, and what is not. It is the business of betting that is sought to be put down by the statute, and with that object those who carry on that business in a house, room, office, or other place, are made responsible to the law. It does not, however, follow that A is amenable to the statute, because he simply, *without more*, makes in his house a bet with his acquaintance, B. In that case there would be no evidence that the house in which the bet was made was, within the meaning of the Act, used for the business of betting—no evidence that it was opened, or kept, or used for the business of betting. By the word "used" I mean used in a way that denotes, perhaps, something less exclusive than opened or kept, but something, nevertheless, that attaches to the house the character of a betting-establishment. If, as I have said, a friend, A, comes to the house of B, and says, "The Grand National will be run next week; what will you give me against 'Ascetic Silver'?" and B says, "10 to 1," and A says, "Very well; done!"—this, *without more*, affords no evidence that the house, or the room in the house, in which the transaction takes place, is a betting-place, or used as a betting-place. To incur legal responsibility the user must be in a betting-place, in a betting-establishment. The particular user or proof *aliunde* must, as I said, attach to the *locus in quo* the character of an establishment for betting, and to incur responsibility for "using a place" the bet must be made by the establishment—that is to say, by the owner or occupier or person using the same—by anyone carrying on therein, as master or servant, the business of betting. It is the class I have mentioned that is responsible to the law in penalties, and not one of the general public who enters a betting-establishment and makes a bet with it.

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Lord Justice A. L. Smith, in giving judgment in the *Kempton Park Case* (1), said (p. 275): "Neither this section (section 3) nor the Act prohibits persons other than professional betting-men resorting to betting-houses for the purpose of betting therein, though if found therein they are liable to arrest and search, and to be taken before a Justice of the Peace." Lord Justice Lindley said (p. 261): "The Act, in short, is aimed at betting-houses and at those who keep them; it is not aimed at betting anywhere, nor at persons who go to betting-houses to bet with those who keep them." Lord Esher, in the same case, is reported to have said (p. 259): "The mischief aimed at was not gaming by betting, nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening or keeping or using a place for the purpose of making, as a matter of business, such bets." Lord Halsbury was to the same effect in the *Kempton Park Case* (2)—"It is obvious," he said, (p. 162), "that the Legislature has not prohibited betting at all, but prohibited keeping a house for betting." Lord Russell, C.J., in delivering the unanimous judgment of the Court for Crown Cases Reserved in the case of *Regina* v. *Davies* (3), said: "The provisions of the statute were intended to prevent the user of a house as a gaming-house." Hawkins, J., in the case of *Hawke* v. *Dunn* (4), which was not overruled on this point in the *Kempton Park Case* (2), is reported to have said that there was no more illegality in making a casual bet in a room not wholly or partially devoted to betting than there is in making one in a field with a person casually found there. By the now leading case on the subject, namely, the *Kempton Park Case* (2), the decision in *Hawke* v. *Dunn* (4) was overruled on the ground that the enclosure therein referred to was not "a place within the meaning of the Act, because what was aimed at and sought to be rendered illegal was a betting-establishment where the business of betting was carried on by the establishment. In reference to the words of the Act, and in particular to the words "a person using the same," Lord Halsbury says (p. 159): "I think it is clear that what the statute is dealing with here is the case of

(1) [1897] 2 Q. B. 242.
(2) [1899] A. C. 143.
(3) [1897] 2 Q. B. 199, at p. 202.
(4) [1897] 1 Q. B. 579, at p. 595.

persons who are in control and occupation of the place which is assumed to be a betting-establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business is that of a betting-house or place to which people can resort for the purpose of betting, not with each other, but with the betting-establishment."

And again (at page 160 of the report), when commenting on the word "use," he is reported to have said: "It is here that I am unable to follow the reasoning of my noble and learned friends, Lord Hobhouse and Lord Davey. They both, if they will forgive me for saying so, employ the word 'use' in a double sense. My noble friend Lord Hobhouse admits the word 'use' is ambiguous, and limits it by such words as 'deliberate, designed, and repeated'; but to my mind these words miss the point. It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting-establishment with the persons resorting thereto."

I find Lord James of Hereford, in the same case, is stated to have said (pp. 195, 196): "Doubtless it is proved that betting as alleged systematically took place within the enclosure to the knowledge of the defendants. Is that evidence sufficient to establish an infringement of the Act? In my opinion it is not. As was often remarked during the argument of the case at the Bar, betting is not illegal in itself, and the statute never intended to make it so. It is only the opening, keeping, or using of a place for the carrying on of a betting business that is illegal. This is shown by the consequences created by sect. 2 of the Act. The place wherein illegality exists is declared to be a common gaming-house, and the right to arrest and search all persons found therein follows. A man who bets or allows betting in his private house, or the man who, associating with his fellows in a club, even a sporting club, there bets upon races, is guilty of no illegal act. In such cases the ingredient of dedication or appropriation of the place to the purposes of a betting business is absent."

The question, then, that we have to determine is, whether there was evidence before the magistrate which could reasonably

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show that the house or shop was used as a betting-establishment. After consideration of that evidence I have come to the conclusion that it was not sufficient to do so, and accordingly was not sufficient to warrant a conviction. The facts are few: they are to be found in the evidence of the constable and Inspector of Police, who were examined. I had better read what they said. The constable with whom the bet was made stated:—[His Lordship read the evidence of Constable Cronin, as given *ante*, pp. 411, 412.] Does the evidence of the constable show that the house or part of it was—to use Mr. Justice Hawkins' expression—devoted to betting; or, to use the expression of Lord James of Hereford, dedicated to, or appropriated for, betting; or, to use Lord Halsbury's words, an establishment for betting? Was there, in fine, evidence to show that the business of betting, as distinguished from the making of a mere bet, was carried on there? I think not. No doubt the bet was made in the house; no doubt the constable backed there the horse "Cherry Ripe," against the field, and handed in the house to the defendant a piece of paper containing his stake, and mentioning the terms of the bet; no doubt the defendant accepted in the house the bet, and said that perhaps the constable had got the right horse: but all this did not, in my opinion, supply any evidence that the house was devoted, was dedicated, allotted to, or appropriated for, the business of betting. There were not in the house itself, or in any portion of it, if I may use the expression, the signs or tokens of a betting-establishment. There was no book produced which purported to be a record of bets; there was not even a sporting journal produced to indicate what the market betting was; there were no facilities for betting; there were no betting lists; there were no slips of paper on the wall such as were referred to in *The Queen* v. *Worton* (1). It was the constable who brought the piece of paper which contained the coin and stated the terms of the bet. And, above all, it was not proved that there was any general resort to the house as a place to make bets. The necessary characterization was wanting. There was simply a single isolated transaction which was not in itself sufficient to characterize the

(1) [1895] 2 Q. B. 227.

house as a betting-establishment. The defendant was, no doubt, willing to bet, and did bet. There may have been evidence sufficient to characterize the defendant, who is said to be assistant to, or an occupier in common with, an ornamental plasterer, as a bookmaker, though not, as Mr. Swifte rightly seemed to think, a professional one. But the evidence of the constable was not, in my opinion, sufficient to characterize the house as an establishment dedicated to, or appropriated for, betting. The mere *naked fact, without more* (I desire to emphasize these words), that a bookmaker made one bet in a house in a which he resided is not enough, in my opinion, to attach to the house the character of a betting-establishment. Lord Halsbury said (see p. 161 of the report of the *Kempton Park Case* (1)), that the alleged distinction between professional betting men and others who make bets was altogether illusory. No doubt if a person opens, keeps, or occupies for the business of betting, a house, room, or office, or uses in his betting transactions a certain definite area appropriated by him for the business of betting—a place where the business of betting is definitely localized by him for the carrying on thereof—he does what Lord Halsbury says is the prohibited thing, and would be liable to conviction. If a man commits an offence once, it is not necessary to wait till he commits it a second time to warrant his conviction and punishment. But the question is, what constitutes the offence? Was any offence at all committed? Was the "prohibited thing" done? But let me see if the evidence of the Inspector supplements the deficiency in proof. I shall read his evidence. [His Lordship read the evidence of Inspector Brennan, as given *ante*, pp. 412, 413.] This is Inspector Brennan's evidence. The three circumstances which may be noted in his evidence are—that an unknown man hurried out of the house after the Inspector had entered it, and that the defendant did not stop in the room when called upon, and did not produce the paper which the constable handed to him, containing the coin and stating the terms of the bet. I do not think that the fact of one man hurrying out of a room when another entered it, though that other was a police officer, in any way assists the determination of

(1) [1899] A. C. 143.

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Lord O'Brien, L.C.J.

the controversy. If we held such a fact to be evidence, we should have allowed ourselves to drift into the region of mere speculation. So also as to the remaining circumstances, that the defendant left the room when called on to stay, and did not produce the paper containing the coin and terms of the bet, which the police constable handed to him. When the Inspector asked him for it, he did not deny he got it, but said merely it was not on his person. No doubt he may have left the room to put it aside; but to hold all this was evidence that the house was a betting-establishment, would be to allow suspicion to take the place of proof. We must not allow suspicion, however strong, to take the place of legal proof, of legal evidence, on which a conclusion may be founded.

On the whole case, I think the defendant should have been acquitted, and we shall so direct. The defendant is to get his costs of the case and of the argument.

GIBSON, J.:—

The only question in this case is whether there is evidence to support the conviction. So many obvious elements of proof are omitted that it would almost seem as if the prosecution was directed to test the irreducible minimum necessary to establish guilt. There is no evidence as to the dimensions or value of the house, which the Court is not at liberty to ascertain for itself from the Directory or otherwise; or as to the ordinary business carried on in the house; or as to the physical construction of the shop and its apparent trade arrangements; or that any betting business had ever, before or after this particular day, been transacted there; or that it had ever been resorted to by members of the betting public; or that defendant had ever been connected with betting business.

There is some evidence that defendant and his brother carried on some kind of business in the house, and that as occupier or otherwise defendant might have had such peculiar or exclusive use of the premises as would warrant a conviction if he used the premises for the purpose of betting.

It is clear that betting, whether in a house or otherwise, is not made illegal. What the statute strikes at is the use of the house

as a basis for betting operations—part of the machinery of a betting business. In certain circumstances a single bet in a house or place, accepted by the person using same, without any proof beyond the transaction itself, and the conduct and language of the parties, might warrant an inference of guilty user; "use," unlike "keep," does not connote duration or plurality of acts. So if the premises were opened for the purpose of betting, the offence would be complete, without any proof of an actual bet.

The point here is, was the one bet proved of such a character as to support a reasonable inference that the premises were used as part of the apparatus of a betting business—that the business was localized? *Stoddart* v. *Hawke* (1).

The constable, who knew defendant well, curiously says nothing as to his antecedents, business, mode of life, or the kind of customers frequenting the shop. He accosted the defendant outside the shop, walked in, made the bet; and the circumstances of the bet are probably like those which would have occurred if defendant was engaged in a betting business. On the other hand, the bet may have been an isolated and casual transaction; it might have been completed in the street; and as the defendant knew who the constable was, he would be naturally likely to be on his guard against him if doing an illegal act. His behaviour when challenged by the Inspector might be explained by a mistaken notion on his part that the acceptance of a bet indoors was illegal. A bookmaker might accept a bet at his private residence to oblige a friend, without any inference thence resulting that the residence by such one act was impressed with the character of a betting-establishment. The case leaves us in the dark as to everything save the actual bet itself. If it had occurred in a large grocery or drapery establishment between the owner and a policeman, could it be said that the premises could be reasonably inferred to be a centre or basis for a betting business? Here we know nothing of the nature of the premises. Where the evidence is equally consistent with either of two alternatives, it proves neither: *Cotton* v. *Wood* (2). This principle is peculiarly applicable to a criminal case where the Court

(1) [1902] 1 K. B. 353, at p. 360. (2) 8 C. B. (N. S.) 568.

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ought to be careful not to strain the law. The defendant's conduct suggests suspicion, and he may have been guilty; but if the evidence is insufficient, he cannot be convicted. If there was no *primâ facie* case proved, he was not called on to examine witnesses, and no adverse inference can be drawn from his not doing so. It would have been otherwise, of course, if there had been such *primâ facie* case.

I have not deemed it necessary to discuss the numerous cases cited at the Bar and in the judgment below. The construction of the statute is settled, and cases decided on different facts mislead rather than assist. No case at all resembling the present was referred to, and probably none exists. I doubt whether, as it stands, the evidence shows that defendant was a betting-man, at least one of a professional type; it certainly fails to prove that a betting business was localized in the house, or that the premises were used as a basis or part of such business. A little more care in the proof might have justified conviction. The officers probably knew several material circumstances which they were not asked. The conviction has no sufficient evidence to justify it. A bare scintilla of evidence suggesting suspicion, but founding no reasonable inference as to the character of the premises, is not enough.

Solicitor for the appellant: *James Scott.*
Solicitor for the respondent: *Malachy Kelly.*

J. G. T.

TOPPIN, APPELLANT; MARCUS, RESPONDENT (1).

K. B. Div.
1908.
April 27.

General Dealers (Ireland) Act, 1903 (3 *Edw.* 7, *c.* 44), *sect.* 2, *sub-sect.* 2 (b)—*Entry of name and place of abode of person from whom article purchased—False name and place of abode given by seller—Liability of general dealer*—Mens rea.

A general dealer is bound to enter the *true* name and place of abode of the person from whom he purchases an article, otherwise he is guilty of an offence under section 2 of the General Dealers (Ireland) Act, 1903, and it is no answer that he entered the name and place of abode given by the seller, and had no reason to believe they were not the true name and abode.

CASE STATED under 20 & 21 Vict. c. 43, from which the following facts are taken :—

At a Petty Sessions held for the Petty Sessions district of Queenstown, in the county of Cork, the respondent was charged on summons on the complaint of the appellant, a District Inspector of the Royal Irish Constabulary, for that he being a licensed general dealer at No. 3, Harbour Terrace, Queenstown, did on the 14th November, 1907, fail to enter in his book the name and place of abode of the person from whom he purchased about 35 lb. of copper, in contravention of the provisions of section 2 of the General Dealers (Ireland) Act, 1903.

On the hearing of the complaint evidence was given on the part of the complainant that an assistant of the respondent stated to a constable that he had bought the copper from a man who gave his name as John Mulcahy, and his residence as 10, The Beach. On the constable examining the general dealer's book, he found such entry was made, viz. :—John Mulcahy, 10, The Beach. Evidence was given that no person of that name lived at such address.

It was proved on the part of the defendant that on the date in question, the 14th November, 1907, the 35 lb. of copper were bought by Solomon Marcus, the son of, and assistant to, the

(1) Before PALLES, C.B., and JOHNSON and KENNY, JJ.

K. B. Div. 1908.

TOPPIN, *Appellant*; MARCUS, *Respondent*.

respondent, from a respectable-looking man who gave his name as John Mulcahy, and his address as 10, The Beach. That he paid him the current price for it. That he had no reason to think otherwise than that the man was telling the truth, and in all good faith entered the name and address, as given, in the book required to be kept in accordance with the General Dealers Act, 1903. That since proceedings were taken he endeavoured in every way to trace the man who sold him the copper in the name of John Mulcahy, 10, The Beach, and afforded the police every facility to discover him, and gave them his full description.

The Justices were of opinion upon the facts that the evidence did not bring the case within the operation of this statute, as it was proved to their satisfaction that the respondent complied with section 2 of the General Dealers (Ireland) Act; that he made the entries according to the information he received, and acted *bonâ fide* in entering the name and address given to him by the person from whom he purchased and received the copper; that he attached the weight and price paid, and labelled the copper accordingly; and it was admitted by the police that they got every assistance from the general dealer to trace the person who sold the copper to him. They accordingly gave judgment dismissing the case on the merits, but, on the application of the complainant, stated the present case, requiring the judgment of the Court as to whether they were correct in point of law in their determination.

The Solicitor-General (*Redmond Barry, K. C.*) and *Dudley White*, for the appellant:—

We submit that to constitute an offence under sect. 2 of the General Dealers (Ireland) Act, 1903, for breach of the provisions in sub-sect. 2 (*b*) proof of *mens rea* is not necessary. [JOHNSON, J., referred to *Sherras* v. *De Rutzen* (1).] By sub-sect. 2 (*b*) the general dealer is required to enter in the book to be kept by him the name and place of abode of the person from whom he purchased the article. The words are not "the name and place of abode *given by* the person," but the name and place of abode of the person. This must mean the true name and place of abode. This

(1) [1895] 1 Q. B. 918.

construction may appear hard on the general dealer; but it is to be remembered that under the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 13, the purchase of copper in a quantity such as here was prohibited altogether. The Act of 1903 is a relaxation of this prohibition, and therefore to entitle a general dealer to the benefit of it the conditions imposed must be strictly complied with. The object of the Act was to place on the general dealer the responsibility of knowing something of the person from whom he was purchasing. If the decision of the magistrates is right, the policy of the Act would be defeated. [They referred to *Campbell* v. *Finn* (1).]

There was no appearance for the respondent.

The judgment of the Court was delivered by—

PALLES, C.B. :—

We are all of opinion that the decision of the magistrates was wrong. The general rule is well known. There is a presumption that *mens rea*—a knowledge of the facts which render the act unlawful—is an essential ingredient in every criminal offence. That presumption is, however, liable to be displaced by the words of the statute creating the offence, or by the subject-matter with which it deals.

The late Mr. Justice Wright, in a learned judgment in *Sherras* v. *De Rutzen* (2), attempts to classify the general lines of cases which are exceptions from the general rule. "Apart," he says, "from isolated and extreme cases of this kind" [viz., such as *Lolley's Case* (3) and *Prince's Case* (4)], "the principal classes of exceptions may, perhaps, be reduced to three. One is a class of acts, which, in the language of Lush, J., in *Davies* v. *Harvey* (5), are not criminal in any real sense, but are acts which, in the public interest, are prohibited under a penalty." The second comprises public nuisances, and the third, cases in which although the proceeding is criminal in form, it is really only a summary mode of

(1) [1907] 2 I. R. 502.
(2) [1895] 1 Q. B. 918, at p. 921.
(3) R. & R. 237.
(4) L. R. 2 C. C. 154.
(5) L. R. 9 Q. B. 433.

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enforcing a civil right. Several instances of the first class, which is the only one germane to the present case, are referred to by Mr. Justice Wright, such as decisions on the Revenue Statutes, where the innocent possession of liquor by a beer retailer was held an offence (1); as under the Adulteration Acts the innocent possession of adulterated tobacco, or the sale of adulterated food (2); or, under the Game Acts, the innocent possession of game by a carrier (3), were held to be criminal. Thus, too, a Guardian of the Poor, whose partner, unknown to him, supplied goods for the poor (4), and a person who received lunatics into an unlicensed house, although he honestly and on reasonable grounds believed that they were not lunatics (5), were held to have been rightly convicted.

It is not necessary here to rely upon this judgment further than to say that where an act, not in any real sense criminal, is in the public interest prohibited under a penalty, the innocent nature of the act is at least an element to assist the Court in determining whether or not *mens rea* is an essential ingredient.

I approach, then, the consideration of this Act bearing this principle in mind. Sub-sect. 2 of sect. 2, with which we have to deal, provides that "Every licensed dealer shall enter in a book to be kept by him on his premises the particulars of each transaction in his business." The object of that provision is to enable stolen goods to be traced by the police; but the mere omission to make the entry is, *per se* and irrespective of intention, an innocent act on the part of the general dealer. The penalty is attached to an act not criminal or *malum in se*.

But, further, the 6th and 8th sections point very strongly to the intention of the Legislature being that non-entry, though without *mens rea*, should be an offence. Sect. 6 imposes an obligation upon the dealer to give information to a police constable

(1) *Attorney-General* v. *Lockwood* (9 M. & W. 378).

(2) *R.* v. *Woodrow* (15 M. & W. 404); *Fitzpatrick* v. *Kelly* (L. R. 8 Q. B. 337); *Roberts* v. *Egerton* (L. R. 9 Q. B. 494).

(3) *Rex* v. *Marsh* (2 B. & C. 717).

(4) *Davies* v. *Harvey* (L. R. 9 Q. B. 433).

(5) *Reg.* v. *Bishop* (5 Q. B. D. 259).

that articles, answering to the description of certain articles mentioned in the section, are in his possession; and also to state the name and address given by the person from whom the articles were received. Then, in its second sub-section, after imposing a penalty for a contravention of the section, the section provides that, in case of articles which it may be difficult to trace out and identify, no fine shall be imposed under the section unless it appears to the Court that the articles were *knowingly concealed* by the dealer. In respect of articles not within the proviso, the offence is the mere omission to give notice of the name and address, although the Court may be of opinion the articles were not knowingly concealed; in other words, although there was no *mens rea*. That section (the offences within which are in character similar to those under sect. 2, sub-sect. 2) in terms shows that *mens rea* is not an ingredient in a large class of cases within the section. Moreover, it shows that where the absence of *mens rea* was an answer to the charge, it so enacted in specific words.

Section 8, sub-sect. 1, by providing that a general dealer shall not sell to, or purchase from, any person *apparently* under the age of fourteen years, evidently differentiates between that case and cases such as *Reg.* v. *Prince* (1), which had been decided under the statutes dealing with assaults on girls, in which it had been held that the offence was committed if within the words of the section, although the accused did not know that the girl was under the age mentioned. This is an express provision that *mens rea* is necessary in that limited class of case.

These sections satisfy me that the Legislature knew and acted on the rules of law that in offences of the class of those created by the Act *mens rea* was not necessary, and that by sect. 2 it intended to make the offence the mere omission to enter the *true* name and place of abode of the person from whom the article was purchased.

No doubt the result of this construction is largely to restrict the sale of small quantities of metal. I agree that that is a very strong thing to do, and that it might well be argued that coercive words were necessary to effect such a restriction, were it not

(1) L. R. 2 C. C. 154.

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that according to the state of the law when this Act was passed, the sale of articles of this description was absolutely prohibited. The Legislature, by this Act, did not impose restriction on the sale of these articles; on the contrary, it relaxed some of those restrictions.

Then I come to the general object of the Act, which was to enable stolen goods to be traced. That object could never be carried out unless the obligation were to give the true name. Were it otherwise, we should have in every case what we are so well accustomed to in cases of receiving stolen goods knowing them to be stolen. It is in such cases almost always alleged that the goods were received from a man alleged to be respectable, but whose name or residence the prisoner does not know, and whom, although he and his friends have ever since been looking for him, he has been unable to find. One of the objects of the statute was to put an end to defences of this class.

We must answer the question put to us by the Justices by declaring that they were wrong in point of law in their determination.

Solicitor for the appellant: *Malachy Kelly.*

J. G. T.

GREAT SOUTHERN AND WESTERN RAILWAY CO., APPELLANTS; GOODING, RESPONDENT (1).

K. B. Div.
1908.
June 17.

Criminal law—Justices—Summary jurisdiction—Larceny—Dismiss without prejudice—Subsequent prosecution for same offence—Criminal Justice Act, 1855 (18 & 19 *Vict. c.* 126), *ss.* 1, 12.

The respondent was charged before Justices at Petty Sessions with larceny of property not exceeding in value five shillings, and consented to the Justices hearing the case, as provided by 18 & 19 Vict. c. 126. The Justices heard the case, and made an order dismissing the charge "without prejudice," and gave the respondent a certificate under their hands of such dismissal:—

Held, that the dismiss, although expressed to be without prejudice, was a bar to a subsequent prosecution for the same offence.

CASE STATED under 20 & 21 Vict. c. 43, from which the following facts are taken:—

On the 4th May, 1908, at Tralee Petty Sessions, the respondent was summoned by the Great Southern and Western Railway Co. under 18 & 19 Vict. c. 126, sect. 1, for that he on the 18th March, 1908, at Fenit, county Kerry, did unlawfully steal a quantity of coal the property of the complainants, value not exceeding 5*s*. The respondent having consented to be summarily tried before the magistrates then present, evidence was given for the prosecution, and their witnesses examined and cross-examined, and the prosecution closed. The solicitor for the respondent then pointed out that in the summons and charge in the order-book the stolen coal was described as the property of the Great Southern and Western Railway Co., whereas the witness for the prosecution swore that the stolen coal was the property of Messrs. Latchford & Sons, Ltd., but in a truck, the property of the complainants, at Fenit Railway Station; and he asked the magistrates therefore to dismiss the case. The magistrates present held that the charge as described in the summons and order-book "on the point of

(1) Before PALLES, C.B., and JOHNSON, J.

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ownership," was not proved by the sworn evidence, and "dismissed the case without prejudice and without costs."

On the 18th May, 1908, at Tralee Petty Sessions, the respondent was again summoned by the Great Southern and Western Railway Co. on exactly the same charge, viz., that he, on the 18th March, 1908, at Fenit, county Kerry, did unlawfully steal a quantity of coal, the property of the complainants, value not exceeding 5*s*. The respondent's solicitor produced a certificate of dismissal of the former charge under the hands and seals of the Justices who adjudicated on it. This certificate followed form B in the schedule to 18 & 19 Vict. c. 126, save that after the words "we did, having summarily adjudicated thereon, dismiss the said charge," there were added the words "without prejudice and without costs."

The Justices, on the second hearing, being of opinion that the former dismiss was a bar to further proceedings, made an order as follows:—"Owing to production of certificate of dismissal without prejudice and without costs on previous hearing, Justices held that present proceedings were estopped, and made no rule." On the application of the complainants in the summons they stated the present case requiring the judgment of the Court as to whether or not they were correct in point of law in their determination.

Phelps (with him *Serjeant Moriarty, K.C.*), for the appellants:—

The first adjudication not having been on the merits did not amount to a determination of the case, and is no bar to a subsequent prosecution: *Foster* v. *Hull* (1); *Lawless* v. *M'Aleer* (2); *per* Andrews, J., at pp. 256, 257.

The Hon. Cecil Atkinson, for the respondent:—

The respondent was in peril on the first trial. There were then a hearing and a determination by a competent tribunal; therefore the acquittal on that occasion is a bar to subsequent proceedings for the same offence: *The Queen* v. *Duncan* (3); *The Queen* v. *The Justices of Antrim* (4); Paley on Summary Convic-

(1) 33 J. P. 629.
(2) [1897] 2 I. R. 248.
(3) 7 Q. B. D. 198.
(4) [1895] 2 I. R. 603.

tions (8th ed.), pp. 167, 168. It is not necessary that the former acquittal should be on the merits: *Tunnicliffe* v. *Tedd* (1); *Reg.* v. *Brakenridge* (2); *Vaughton* v. *Bradshaw* (3). The statement relied on of Andrews, J., in *Lawless* v. *M'Aleer* (4), was merely a *dictum*, and not necessary for the decision of the case.

PALLES, C.B.:—

I am of opinion that the decision of the Justices is right. As the defendant submitted to their jurisdiction, they had jurisdiction under 18 & 19 Vict. c. 126, to decide his guilt or innocence; and, therefore, we start with this, that the defendant was put on trial for this larceny before a Court of competent jurisdiction. Now, I take it that there is nothing more settled in our law than that (where there is no express provision, such as is contained in the Petty Sessions Act, enabling an adjudication to be made without prejudice) if a person be once in peril in a criminal case, that is, if he be once tried before a Court having jurisdiction to hear and determine, then if there be a determination of acquittal, the matter cannot be brought up a second time for adjudication. The judgment of Lord Coleridge, C.J., in *The Queen* v. *Duncan* (5), as to this, is now almost classical. He says:—"The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." It is true that in *The Queen* v. *The Justices of Antrim* (6), Holmes, J., expressed an opinion which, for my own part, I think is absolutely correct, that if the Court had no jurisdiction to hear the case, then the man was not in danger within the meaning of this rule, because the sentence against him would be wholly unauthorized, and its execution an unlawful act. But here, as I have said, there was jurisdiction under the statute to hear and determine the case.

The case, therefore, comes to this: Has there been here an

(1) 5 C. B. 553.
(2) 48 J. P. 293.
(3) 9 C. B. (N. S.) 103.
(4) [1897] 2 I. R. 248.
(5) 7 Q. B. D. 198, at p. 199.
(6) [1895] 2 I. R. 603.

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acquittal, or is the decision at which the magistrates arrived wholly null in consequence of the admittedly erroneous and illegal part of it which states that the dismiss is without prejudice? In construing a document such as this order of the magistrates, we must see what is the principal matter it contains, and what is merely incidental or accessory. We must analyse the order. We must see what is essential, and we should not be justified in holding it void as a whole, if we were of opinion that in its essentials it was authorized, merely because something collateral was added which did not really affect the essence of the determination, and which, therefore, could be rejected. That rule has always been applied in determining what is surplusage and what is not. In determining that we must look at the nature of the document itself. It is a determination in a criminal case that the man is not to be convicted; and this undoubtedly involves that the tribunal is *not satisfied* on the evidence before it that the man *ought to be* convicted. But the accused is entitled to be acquitted if the Justices are of opinion that, on the evidence before them, he *ought not to be* convicted. The magistrates, therefore, say in substance by this dismiss without prejudice, "On the facts before us there was not evidence to justify us in convicting the accused, but we think that the Crown ought to have an opportunity of bringing the case forward again on a subsequent occasion." This expression of opinion cannot affect the principal matter that has gone before —their adjudication that the evidence of guilt was insufficient. Their opinion that, notwithstanding this, the matter should be capable of being brought forward on a future occasion, cannot affect that adjudication.

The case is identical with that put by my brother Johnson, that of a jury saying, "We acquit the accused, but we think the case is such that the prosecutor ought to have an opportunity of bringing the case forward again." These latter words would undoubtedly be rejected there; so also the words "without prejudice" ought to be rejected here.

It is dangerous to infringe on one of the great principles of liberty, as is that here. Nothing would induce me to do so except the compelling force of a statute.

I am clearly of opinion that the magistrates were right.

JOHNSON, J., concurred.

Solicitor for the appellants: *Croker Barrington.*
Solicitor for the respondent: *James Murphy.*

J. G. T.

IN RE PEMBROKE ELECTION PETITION (1).

Local Government election—Petition—Irregularities in conduct of election—Non-compliance with prescribed Rules and Forms—Absence of corrupt or illegal practice by candidate—Principles of Ballot Act, 1872 (35 & 36 *Vict. c.* 33)—*Case stated by Commissioner—Mandamus—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *sect.* 93, *sub-sect.* 8.

At an election of fifteen members of an Urban District Council twenty-nine candidates were duly nominated. There were, prior to the opening of the poll, two supplemental ballot-boxes on the premises where the election was held, one in charge of a presiding officer, and one in the custody of the returning officer, which were not opened or shown to be empty before the opening of the poll (2), but each of which, before being brought into use when the other boxes were filled, was opened, shown to be empty, and re-sealed. The returning officer did not count or record (3) the number of ballot-papers in each box, or mix the whole of the ballot-papers before counting; but this was omitted with the approval and assent of the agents for all the candidates:—

Held, that though these were breaches of the rules in Schedule I. to the Ballot Act, they did not violate any principle laid down in the body of the Act, and were not sufficient to avoid the election.

The agent of the successful candidates lodged with the returning officer in due time a form of nomination, signed by eight of the candidates, naming ten agents for attendance on their behalf on the polling-day.

The returning officer, in a circular to the candidates, stated that there were two polling-stations; but there were, in fact, ten tables, at which ballot-papers were given out and stamped by assistants, appointed by the returning officer, with the approval and being under the control of the officer presiding at each table. The unsuccessful candidates were informed of the nomination of the ten agents, and they requested the returning officer to allow them to

(1) Before PALLES, C.B., and JOHNSON, WRIGHT, and DODD, JJ.
(2) Ballot Act, 1872, Schedule I., 23. (3) *Ibid.* 34.

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In re PEMBROKE ELECTION PETITION.

appoint a like number, to which he agreed. They had, in fact, seven agents. The Commissioner who tried the election petition found, as facts, that the agent for the successful candidates, in nominating ten polling-agents, *bona fide* believed that he was entitled to do so; that the returning officer, in accepting the nomination, and in permitting each side to have ten agents, was actuated by a *bona fide* desire to convenience and facilitate all parties; and that all the arrangements made by the returning officer for the election were made by him with a *bona fide* desire to facilitate electors in voting, and to prevent confusion and delay, and in the Commissioner's opinion they did so operate.

The Commissioner finally stated that he was of opinion, and so found as facts, the following—(*a*) At the polling every elector who attended had full opportunity of recording his or her vote. (*b*) The election was conducted in accordance with the principles contained in the body of the Ballot Act, 1872, and of the Local Government (Ireland) Act, 1898. (*c*) If any of the matters complained of by the petitioners were or was a non-compliance with, or a non-observance of, or a departure from, any of the requirements of or under the rules or the forms in the Schedule to the Ballot Act, 1872, or of or under the rules of the Election Order of the 22nd December, 1898, the same or any of them did not in any way affect the result of the said election :—

Held, by Palles, C.B., that the validity of the election must be determined on the basis that there were only two polling-stations, and therefore the nomination was contrary to Rule 17 of the Local Government Board's Election Order of the 22nd January, 1898 (1).

Held, further, by Palles, C.B., and Dodd, J. (who, however, did not make it the basis of his judgment), that this Order was *ultra vires*, as being contrary to section 24 of the Ballot Act, 1872.

Held, further, by Palles, C.B., that although the presence of a number of agents in excess of the number allowed by section 13 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 77) (2), was

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(1) "*Polling Agents.*—If there are only two candidates, each of them may, in writing, appoint a polling-agent for each polling-station, who may be paid or unpaid. If there are more than two candidates, any number of them, being not less than one-fourth of the whole number of candidates, may, in writing, appoint one polling-agent for each polling-station, who may be paid or unpaid. A notice of any such appointment shall be delivered at the office of the returning officer not less than two clear days before the day of the poll. Except as aforesaid, no polling or personation agent, whether paid or unpaid, shall be appointed for the purposes of the election."

(2) Section 13 (1)—"No person shall, for the purpose of promoting or procuring the election of a candidate at a municipal election, be engaged or employed for payment, or promise of payment, for any purpose or in any capacity whatever, except as follows, that is to say,

. . . . . .

(*b*) One polling-agent may be employed in each polling-station."

contrary to the principles of that Act, and to the rules in the Schedule to the Ballot Act, it was not contrary to any principle laid down in the body of the Ballot Act, and that, consequently, the election could not, on that ground, be declared void, if the illegality be excused by the Commissioner.

Held, by Johnson, J. (in whose judgment Wright, J., concurred), that having regard to the findings of the Commissioner, notwithstanding the admitted irregularities, the election was conducted in accordance with the principles laid down in the body of the Ballot Act and the Election Order, 1898, and that therefore the election ought not to be declared irregular and void.

Held, by Dodd, J., that if Rule 17 of 22nd December, 1898, was *intra vires* it must receive a reasonable construction. Its hypothetical object, to prevent the polling-station being crowded and to limit expense, could only be justified if there remained an adequate check on possible breaches of the Ballot Act by an adequate number of agents; that the candidates were within their rights in demanding proper inspection and proper agents for their own protection and the proper carrying out of the Act; and, from the candidates' point of view, there being ten polling-stations—the number of agents nominated were rendered necessary by the conduct of the returning officer, and was, in fact, a necessary precaution; and that therefore the question put by the Commissioner —whether, under the circumstances, the election should be declared invalid and void—should be answered in the negative.

Where, at the trial of a Local Government Board election petition, the Commissioner states a case for the opinion of the Court, under sect. 93, subsection 8, of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), he cannot be compelled by mandamus to determine any particular questions of fact, or to amend the case stated by including therein his determination of any particular facts.

Query: Does mandamus lie to the Commissioner appointed for trial of a Local Government election petition?

CASE STATED by George Hill Smith, Esq., Barrister-at-Law, Commissioner for the trial of the election petition for the opinion of the Court.

The petitioners were Lawrence Redmond, Valentine Fulham, Richard Dardis, and James Gough, and the respondents were Joshua Carroll Manly (returning officer) and Sir Robert Gardner, William Battersby, William Beckett, Frederick Flood, Charles W. Egan, William Hewat, John Parkes, Robert Mitchell, John Goodfellow, David W. Carpmills, John Good, Walter Sexton, Thomas M. Gerrard and F. Loftus M. Nuzum. The case stated was as follows:—

1. At this election, held on the 15th January, 1908, there were

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twenty-nine candidates duly nominated, out of whom fifteen were to be selected to act as Urban Councillors for the then ensuing three years.

2. Joshua Carroll Manly, the Town Clerk, acted as the returning officer, and, in that capacity, is named as one of the respondents. The other respondents are fourteen out of the fifteen candidates who were declared elected. The petitioners are four electors whose names appear on the Register of Voters for the year 1908. No one of those petitioners was examined before me.

3. As such returning officer, Mr. Manly sent out to each of the twenty-nine candidates so nominated two circulars, each dated the 8th January, and I annex copies of such two circulars, to which I beg to refer (1).

4. In response to such circulars, there was lodged with the returning officer, in due time, one form of nomination of agents (signed by eight of the respondents other than Mr. Manly), naming ten agents for attendance on their behalf on the polling-day; and immediately after (on the same day) the agent for the other side, *i.e.*, the candidates, other than the fourteen respondents who were declared elected, handed in two forms of nomination of agents, each signed by six of such candidates, and each nominating two agents (that is four in all) on their behalf.

(1) No. 1.

RETURNING OFFICER'S CIRCULAR (to each candidate) OF THE 8TH JANUARY, 1908.

URBAN DISTRICT COUNCIL OF PEMBROKE, CO. DUBLIN.—ELECTION OF URBAN DISTRICT COUNCILLORS.

PEMBROKE TOWN HALL,
BALL'S BRIDGE, PEMBROKE, CO. DUBLIN,

8th January, 1908.

SIR,—As doubts may arise as to the appointment of agents, and also as to the right of candidates to be present at the polling and counting of votes, let me say that, as there will be two polling-stations, any six candidates may appoint one agent to attend each station. If candidates appoint agents for the purpose, they themselves have no legal right to be present at either the poll or the counting.

5. I found as a fact that the circumstance of the ten agents having been nominated by respondents was immediately (on the 11th January) communicated to the agent for the said other side; and that such agent then requested the returning officer to permit

If any candidate wishes to be present at the counting of the votes, he may be present if he undertakes the duty of an agent, and sends me notice to that effect one clear day before the opening of the poll.

I am, sir, your obedient servant,

J. C. MANLY,
Returning Officer.

To (each candidate by name).

No. 2.

RETURNING OFFICER'S SECOND CIRCULAR (to each candidate) OF SAME DATE. (As to agents, the first part; the second part deals with the counting, which is not material.)

PEMBROKE URBAN DISTRICT, CO. DUBLIN.—ELECTION OF URBAN DISTRICT COUNCILLORS.

TOWN HALL, BALL'S BRIDGE,
PEMBROKE, CO. DUBLIN.
8*th January*, 1908.

SIR,—Permit me to draw your attention to the statutory rules regulating the appointment of agents at Urban District Elections.

"17. If there are only two candidates, each of them may, in writing, appoint a polling-agent for each polling-station, who may be paid or unpaid. If there are more than two candidates, any number of them being not less than one-fourth of the whole number of candidates may, in writing, appoint one polling-agent for each polling-station, who may be paid or unpaid. A notice of any such appointment shall be delivered at the office of the returning officer not less than two clear days before the day of poll. Except as aforesaid, no polling or personation agent, whether paid or unpaid, shall be appointed for the purposes of the election."

Under this rule I am prepared to receive, not later than Saturday, the 11th inst., at 5 o'clock p.m., notice of the selected agents. Unless so selected and notified, no agent can be admitted to the polling-stations.

I enclose forms for appointment of agents, also for the statutory declaration of secrecy.

I am, sir, your obedient servant,

J. C. MANLY,
Returning Officer.

To (each candidate by name).

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him to appoint ten agents also, and that the returning officer at once agreed to allow him to appoint ten agents if the names were handed in any time up to the opening of the poll.

6. I found as a fact that at the time the agent for the respondents named ten agents he was under the *bona fide* belief that he was, on their behalf, entitled to do so, and that in accepting such nomination, and in permitting each side to have ten agents, Mr. Manly was actuated by a *bona fide* desire to convenience and facilitate all parties.

7. I found as a fact that, during the polling, there were ten agents acting for the said respondents all through the day, and that for the other candidates there were only four until 8.45 o'clock, a.m., but that from that time (8.45 o'clock, a.m.) up to the close of the poll at 8 o'clock p.m., the other candidates had seven agents acting for them. I also found that each of those seventeen agents took the declaration of secrecy before acting, and that each was paid.

8. I found as a fact that the returning officer made the following arrangements for the polling, and I attach hereto a plan (which was proved before as accurate) which may more clearly elucidate those arrangements for the High Court (1).

9. He placed one presiding officer at each southern end of the gallery (in an annexe of the Royal Dublin Society's show ground at Ball's Bridge, adjoining the Pembroke Town Hall) whose positions are marked "13" and "14" on plan. Each of those officials had a ballot-box (or boxes) in his own charge for the reception of the ballot-papers of the electors who could mark their own papers. Those presiding officers had not, nor did they give out, any ballot-papers during the day.

10. He placed another presiding officer at each northern end of the gallery whose positions are indicated by the numbers "11" and "12" on plan. Each of these officials had a ballot-box in his charge into which the ballot-papers of "illiterate" voters when marked by him were placed. Each of these presiding officers had a copy of the Register of Voters, but had not and did not give out during the day any ballot-papers. "Illiterate" voters took their declarations of inability to read at those tables and at these alone.

(1) See plan annexed.

11. He had five tables on each side of the gallery (those on east side are marked on plan "1," "2," "3," "4," and "5," and those on the west side "6," "7," "8," "9," and "10") in charge of assistants appointed by him, two at each table, to whom with the knowledge and approval of the presiding officer having each of them under his control, he delegated the duties of giving out and stamping ballot-papers when applied for, and marking out the names on the section of the register applicable to the numbers on it they had to deal with (and which for each table averaged about 500). This delegation was adopted and sanctioned by the presiding officer over each set of assistants, and to enable such assistants to discharge such duties they were, for each of the ten tables, supplied with ballot-papers, stamping machine, and a copy of the appropriate section of the Register of Voters.

12. On the east side, the tables numbered on plan "3," "4," and "5" were in charge of the presiding officer at table (on plan No. "13") at the southern end of that side; and tables "1" and "2" were in charge of the presiding officer at table (No. "11") at the northern end of that side.

13. On the west side tables Nos. "6" and "7" were in charge of the presiding officer at table No. "12" at that side, and tables Nos. "8," "9," and "10" in charge of the presiding officer at table No. "14" on same side.

14. When each "literate" voter got his ballot-paper at any one of the tables ("1" to "5" inclusive) on the east side, he or she went into one of the compartments on that side which were opposite the presiding officer at table No. "13," and having marked it, placed it in the ballot-box in front of that officer, and passed out by the exit door there. A similar course was followed (as regards papers for literates) given out at tables "6" to "10" inclusive on the west side of the gallery where ballot-box was at table "14."

15. When an "illiterate" voter applied for his or her ballot-paper and obtained it at any one of the tables No. "1" to No. "5," he or she was brought down by an agent or official to the "illiterate" table (No. "11") on that side, where the declaration would be made, and the paper marked by the presiding officer, and by him put in the ballot-box before him there.

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16. A like course in every respect was followed with "illiterate" voters who got their papers at any of the tables "6" to "10," who were brought up and dealt with at the "illiterate" table ("12" on that side).

17. No case of personation arose during the day, and no presiding officer was called upon to direct the arrest, expulsion, or exclusion of any person.

18. I found as a fact that all the arrangements so made were made by the returning officer, with a *bona fide* desire, as far as possible to facilitate electors in voting, and to prevent confusion and delay in the polling place; and, in my opinion, they did so operate.

19. It was submitted on the part of the petitioners that the appointment of ten agents for the respondents was, in the face of Mr. Manly's circulars of the 8th January, and of the language of rule 17, illegal and in violation of the principles contained in the body of the Ballot Act, and contrary to the rules thereunder, and that the appointment of two agents only was legal, and that, therefore, the presence of more than two in the polling-place was illegal and in violation of the secrecy of the Ballot Act at the "illiterates" table.

On the part of the respondents (other than Mr. Manly) it was submitted that, as ballot-papers were to be given out at each of the ten tables, they were entitled to have an agent at each table; and that as each of such agents had been duly appointed and had taken a declaration of secrecy, the presence of any of them at any time during the day of polling was not illegal, and was not a violation of the secrecy of the ballot at such tables; and that, having regard to the language of rule 17, and to the arrangements made for the polling by the returning officer, each of the ten tables was a separate polling-station and was properly regarded as such by said respondents.

20. I found as a fact that, prior to the opening of the poll, four ballot-boxes, one being in charge of each presiding officer, were duly opened, shown empty, and then sealed up again, in the presence of the agents there, before 8 o'clock, a.m.; and that at the table No. "13" a supplemental box was similarly dealt with at the same time, and was there kept in reserve until the first became full, and was then in the afternoon brought into use.

21. I found as a fact that prior to the opening of the poll, there were two supplemental boxes on the premises—one in charge of the presiding officer at table No. "14," and one in the custody of the returning officer in a room behind his own table (No. "15")—which were not opened or shown empty before the commencement of the polling, but one of which was—before being opened brought into use—opened, shown empty, and sealed up again about 2 o'clock p.m., and the other box was similarly dealt with about 7 o'clock p.m., both being required because the boxes which they replaced had become full and could no longer be used.

22. On the part of the petitioners it was submitted that these two last-mentioned boxes should have been opened, shown open, empty, and sealed up before the opening of the poll at 8 o'clock, a.m.; while the respondents submitted that, being on the premises before 8 o'clock a.m., and being, in fact, exhibited open, and empty and sealed up, before each was put into use, there was and is a substantial compliance with the rule on the subject.

23. I personally inspected, in presence of counsel and solicitors for all the parties, the place in which the polling was carried out, having had it reconstituted, arranged, and fitted, as it was on the 15th January last. I found as a fact that it was well suited and arranged for such a purpose, at a convenient centre for the electors, and affording ample room, and that there was no structural obstacle to the full view by the presiding officers at each side of the gallery over the entire intermediate flooring space.

24. I found as a fact that the returning officer did not count or record the number of ballot-papers in each box, or mix the whole of the ballot-papers before counting, or draw up any list of the result of such verification; but the evidence satisfied me, and I so find, that such omissions on his part were with the approval and assent of the agents for the respondents and for the defeated candidates, respectively.

25. I append in schedule (No. 6 therein) a list of the candidates returned, and of those rejected, and the number of votes given to each.

26. At the request of counsel I furnished each party with a copy of the draft case I had prepared (on the requisition of counsel for petitioners), and have been furnished with notes by

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each in relation thereto, and, so far as I considered such notes relevant or pertinent to the questions hereby submitted for decision, I have embodied them in this case, which I now beg leave to submit.

Subject to the decision of the Court above, on the questions hereby reserved for its decision (and indicated at paragraphs 19 and 22 herein),

I am of opinion, and so find as facts, the following:—

(*a*) That at polling on the 15th January, 1908, every elector who attended for the purpose of voting had a full and free opportunity of recording his or her votes or vote for whichever candidates or candidate he or she preferred or chose.

(*b*) That said election was conducted in accordance with the principles contained in the body of the Ballot Act, 1872, and of the Local Government (Ireland) Act, 1898.

(*c*) That if any of the matters complained of by the petitioners, and stated or referred to in this case, were or was a non-compliance with or a non-observance of, or a departure from any of the requirements of or under the rules or the forms in the schedule to the Ballot Act, 1872, or of or under the rules of the Election Order of the 22nd December, 1898, the same or any of them did not in any way affect the result of the said election.

Under such circumstances, I beg to request the decision of the High Court as to whether the election so held should, or should not, be declared invalid and void?

George Hill Smith, *Commissioner.*

21*st May*, 1908.

T. M. Healy, K.C., and *William M'Grath*, for the petitioners.

Gordon, K.C., and *Pigot*, for the returning officer.

S. L. Brown, K.C., and *W. G. Gibson*, for the other respondents:—

The arguments are sufficiently stated in the case stated and in the judgments. The returning officer contended that there were but two polling-stations, while the other respondents based their arguments on the assumption that there were ten.

[The following cases were referred to:—*Election Petition for the Borough of Drogheda* (1); *Gribbin* v. *Kirker* (2); *Woodward* v. *Sarsons* (3); *Pickering* v. *James* (4); *Thornbury Election Petition* (5); *Oldham Case* (6).]

At the close of the arguments on the case stated the petitioners applied, on notice served by leave of the Court, for an absolute order for a writ of mandamus directed to the learned Commissioner to adjudicate upon and determine according to law and his duty in that behalf the following questions:—

1. The number of polling-stations provided at the said election.

2. Whether said number of polling-stations was the legal and proper number.

3. Whether, if two polling-stations be determined to have been provided at said election, the respondents other than J. C. Manly were guilty of an illegal practice by an illegal employment of an excessive number of paid polling-agents.

4. Whether, if ten polling-stations be determined to have been provided at said election, said election was conducted in accordance with the principles of the Ballot Act and the rules thereunder.

5. Whether, if it be determined that two polling-stations were provided at the said election, certain unauthorized persons were illegally permitted to become acquainted with the manner in which illiterates and others voted, contrary to sections 2 and 4 of the Ballot Act.

6. Whether presiding officers at the said election permitted breaches of Rule 21 of the First Schedule to the Ballot Act by not excluding unauthorized and improperly appointed polling-agents from the polling-agents' stations.

7. Whether, contrary to section 2 of the Ballot Act, ballot-papers were, under the returning officer's arrangements, deposited in ballot-boxes in a polling-station other than that in which such papers were issued.

The petitioners alleged in their affidavit, filed in support of the application, that a number of matters vital to their case, and legally raised before the Commissioner on their behalf by counsel, had not been adjudicated upon or determined by the Commissioner or reserved for the Court, and after due demand, made respectfully to the Commissioner, he had refused to determine same according

(1) 9 Ir. L. T. R. 161; 2 O'M. & H. [201.
(2) I. R. 7 C. L. 30.
(3) L. R. 10 C. P. 733.
(4) L. R. 8 C. P. 489.
(5) 16 Q. B. D. 739.
(6) 1 O'M. & H. 151.

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to law, or to reserve them for the opinion of the Court. During the hearing of the petition it was admitted by counsel for the respondent Joshua Carroll Manly that only two polling-stations existed at the election, whereas counsel for the other respondents contended that there were ten polling-stations, and that they were therefore entitled to appoint ten paid agents; and it was conceded that if only two polling-stations existed the respondents other than Joshua Carroll Manly had each been guilty of an illegal practice. It was also sworn by the solicitor and agent for said latter respondents that the appointment of ten paid agents was done deliberately and not inadvertently, and that such appointment was a most important matter for their clients. The question of illegal practice was not referred to in the judgment of said Commissioner, or in the case stated, nor did the Commissioner suggest that a number of polling-stations, exceeding the two appointed by the respondent Joshua Carroll Manly legally existed.

They were advised that the non-determination of the question whether there were two or ten polling-stations, and of the other questions set out in the list of undetermined matters, furnished to the Commissioner, made it impossible for him to say whether there had or had not been a breach of the principles of the Ballot Act. It was never contended on their behalf that the illegality in the appointment of ten paid agents constituted a breach of such principles, or was other than a violation of the Corrupt Practices Code.

The Commissioner by way of answer stated in his affidavit that he had dealt with all the matters at issue between the several parties either in the petition or in the evidence. The several questions, Nos. 1 to 7 inclusive, were already embodied by him in the case; and in paragraphs 3 to 18 therein he had fully and fairly set forth the facts as proved in evidence before him, which, in his opinion, were necessary for the High Court to know in order that such Court might decide the question of law arising thereon which he had submitted for the opinion of the Court.

The decision of the High Court upon the points raised in paragraph No. 19 of the case would, in his opinion, enable each one of the questions, No. 1 to 7 inclusive in the schedule, to be finally decided and dealt with, and he submitted that until this

Court did pronounce its decision upon such points so reserved as aforesaid, it would be improper of him, and disrespectful to the High Court, that he should give any judgment upon such matters. In delivering judgment he had referred to all the matters connected with the polling arrangements and the appointment of agents; but he stated—"I notice these matters as facts, though I have agreed to submit the legality of all such appointments for the decision of the High Court"; and he added: "Of course all I have just said as to these several tables and their arrangements is not intended by me in any way to anticipate the decision of the Court above on their legality. I only deal with the facts as indicating to my mind the *bona fide* intention on Mr. Manly's part to enable electors most readily to record their votes for whatever candidate or candidates they preferred."

Healy, K.C., and *William M'Grath*, for the petitioners.

Chambers, K.C., and *John Whitaker*, for the Commissioner.

[The following cases were referred to:—*Ex parte Ayres* (1); *Marsland* v. *Hickman* (2); *Preece* v. *Harding* (3); *Islington Case* (4).]

Cur. adv. vult.

Judgment was given on the two branches of the case on the same day.

MANDAMUS.

June 22.

PALLES, C.B.:—

This is an application for a prerogative writ of mandamus to George Hill Smith, Esquire, the Commissioner who constituted the Court which tried this petition, to amend the case stated by him for the opinion of this Court, by including therein his findings on certain matters of fact. It has been opposed by Mr. Chambers, for the learned Commissioner, for, *inter alia*, two reasons: (1) that this Court has no jurisdiction to issue a mandamus to such a tribunal; (2) that, as there is no duty upon the Commissioner to

(1) 54 L. T. (N. S.) 296.
(2) 2 T. L. R. 398.
(3) 24 Q. B. D. 110.
(4) 5 O'M. & H. 120.

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state a case, there can be no duty upon him to state any particular facts in such a case.

In my opinion, the second of these reasons affords a complete answer to this application.

The present case has not been stated in pursuance of an order of this Court, under sub-sect. 7 of sect. 93 of the Municipal Corporations Act, 1882. The Commissioner, therefore, had, and has, complete jurisdiction to determine every matter of fact relevant to the validity of the election; and he is under a duty to do so. He had also full jurisdiction, if he thought proper to do so, to determine every relevant question of law. He had, under sub-sect. 8 of the same Act, *power* to state a case, upon any question of law which appeared to him to require further consideration by the High Court; but the exact frame of the question of law to be so stated rests in his sole and uncontrollable discretion, and he, and he alone, is to determine what are the facts upon which depends the decision of the question which he desires to reserve. The question of law must always be what is the legal effect of the facts stated. If all the relevant facts are not stated in the case, then the opinion of the Court may be valueless to the Commissioner; as his ultimate decision must, in such a case, depend not only upon the facts stated in the case, but on those, together with the additional relevant fact or facts which, *ex hypothesi*, has or have been omitted. In such a case, the question of law to be determined by him, as incidental to his decision upon the petition, cannot be identical with that upon which the opinion of this Court may have been obtained: because, were they identical, the omitted fact or facts could not be relevant, as *ex hypothesi* they are. Therefore, in such a case, the ultimate question of law must be decided by the Commissioner himself upon his own responsibility, and without the authority of the Court. The only question of law which can be reserved is one which "*appears to*" him "requires further consideration by the High Court"; and the facts to be stated in the case are necessarily those on which it "appears to" him the question depends. If an additional relevant fact be introduced, the question of law becomes a different one; and, therefore, to grant this application would be to compel him to state a case upon a question of law which he did not desire to

reserve. Such a thing is completely out of our power. I need not say that cases in relation to the duties of magistrates do not apply. They, under certain circumstances, *are* under a duty to state a case. The Commissioner *is not*.

Mr. M'Grath urged that although this may be so we have jurisdiction to compel the Commissioner to determine the facts. Ultimately, *i.e.*, before he gives his decision, which, to the present, he has not given, he must, no doubt, determine all facts which appear to him to be relevant; but neither have we now, nor, as it appears to me, at any future time shall *we* have, jurisdiction to decide that any particular fact is relevant, and to *order* him to determine it. To do so would be to exercise functions which we do not possess, viz., those of an appellate tribunal.

Upon this ground, therefore, the second of those relied on by Mr. Chambers, I hold the application to be wholly unsustainable. It is therefore unnecessary to say anything on the other ground relied on. As to it, however, I desire to state this, that although possibly—nay indeed probably—the Election Court is a tribunal to which the writ of mandamus cannot go, yet I would be sorry to hold that, if a state of facts were brought before us in which it was essential to the ends of justice to ascertain whether a certain thing took place before the Election Court, this Court would not have jurisdiction to require information as to it from the Election Court, just as if it were a Division or a Judge of the High Court. I conceive that we have this jurisdiction, under sect. 100, sub-s. 4, which confers upon the High Court the same jurisdiction with respect to a municipal election petition as if the petition were an ordinary action within its jurisdiction. We have not, up to the present, had before us any case in which it would be necessary for us to exercise such jurisdiction, nor do I exactly see how such a case is likely to arise, and I mention the matter only because I do not like to be supposed to say anything which might be used hereafter to shorten the arm of this Court. I dislike, indeed I fear, to unnecessarily assent to general negative propositions. Of this, however, I am clear: that such jurisdiction does not, in the present case, justify us in inquiring into any fact not stated in the case.

As to the Commissioner's costs of appearing before us, the application is not, in my opinion, "incidental to the presenta-

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tion of the election petition," or "the proceedings consequent thereon," within the meaning of section 98 of the Act of 1882. They therefore are not excluded from our jurisdiction, as are the costs referred to in that section. They should, therefore, be dealt with as those of opposing any unsuccessful application for a mandamus; and consequently should be paid by the applicants to the Commissioner.

The motion should be refused, with costs.

The other members of the Court concurred.

CASE STATED.

PALLES, C.B. :—

After much consideration, I have arrived at the clear conclusion that we cannot declare the election void.

Of the many classes of irregularity in the conduct of an election two are material in the consideration of the question here:—

First—Those cases in which, by reason of the irregularity, the conduct of the election is contrary to the principles laid down in the body of the Ballot Act. In such a case, to use the words of Lord Coleridge, in *Woodward* v. *Sarsons* (1), the election is "not really conducted under the subsisting election laws," of which the Ballot Act is one of the principal and most important. Consequently, according to the common law affecting elections, as laid down in that case, as well as by what I regard as the clear construction of the Ballot Act, such an election ought to be declared void.

The second class of irregularity is where, though the conduct of the election has been in accordance with the principles laid down in the body of the Ballot Act, and of the other existing election statutes, yet there has been a breach of the rules or forms in the schedule to the Ballot Act, or there has been a breach of some of the subsidiary provisions of those statutes; but where there has not been a corrupt or illegal practice by the candidate.

Speaking generally, an irregularity of this second class will not, *per se*, avoid the election. Avoidance in such a case depends not upon the statute, but upon the common law affecting elections; and avoidance or non-avoidance depends upon whether

(1) L. R. 10 C. P. 744.

such irregularity had, or might have, affected the result. This, too, is the effect of the decision in *Woodward* v. *Sarsons* (1).

Now, whether a particular irregularity has actually affected, or might have affected, the result of an election, is a matter of fact, which we are without jurisdiction to determine. It is found, as a fact, in the case stated (subject, no doubt, to a qualification), that the irregularities here have not affected the result. The qualification, subject to which this finding is made, is the opinion we may form upon the questions reserved; but as we have no power to determine facts, or draw inferences of fact, this qualification can have no effect. There is no finding of fact one way or the other, whether the irregularities might have affected the result; and, therefore, we are unable to act upon the assumption that they might. It logically follows that we cannot avoid the election upon the ground of any irregularity of the second class.

This brings me to the question reserved. This question, although it is put, at the end of the case stated, in the general terms, "Whether, under the circumstances stated in the case, the election should or should not be declared invalid and void?" is limited by the 26th paragraph of the case stated to the questions indicated at paragraphs 19, 22, and 24.

The matters for consideration can be simplified by at once eliminating the questions raised in paragraphs 22 and 24.

Paragraph 22 refers to the two supplemental ballot-boxes which, at the opening of the poll, were on the premises, one in charge of the presiding officer at table No. 14, and one in the custody of the returning officer in the room behind himself at table No. 15. These ballot-boxes were not opened or shown to have been empty before the commencement of the polling; but each of them, before being brought into use, was opened, shown empty, and sealed, both being required, because the boxes which they replaced had become full, and could no longer be used.

Paragraph 24 finds that the returning officer did not "correct" (which is agreed to be a mistake for "count"), or record the number of ballot-papers in each box, or mix the whole of the ballot-papers before counting, or draw up any list of the result of such verification.

(1) L. R. 10 C. P. 733.

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Each of these acts was a breach of the rules in the schedule to the Ballot Act; but it is impossible to suggest that any of them violated any principle laid down in the body of the Act, as distinguished from the schedule. The machinery prescribed by the schedule for carrying into effect certain principles was, in these instances, not resorted to; but the principle itself, as distinguished from the machinery to carry it into effect, was not violated; and, having regard to the findings of fact I have referred to, and to the absence of a finding that these acts might have affected the result of the election, I am of opinion that these breaches of rules are not sufficient to avoid the election.

There remains, then, the important question raised by paragraph 19. That paragraph appears to me to involve two questions:—

1st—Whether the appointment by the respondents of the ten agents was in violation of the principles laid down in the body of the Ballot Act?

2ndly—Whether it was illegal?

The violation of the principles in the body of the Ballot Act is, in this 19th paragraph, and indeed throughout the argument has been, rested upon the illegality of the appointment of this number of agents, which, it is alleged, was in excess of the number of polling-stations; and, therefore, the first matter for determination is, were there two, or ten, polling-stations?

This is, *prima facie*, a question of fact; and, as I have said, we are without jurisdiction to determine questions of fact. This is the first difficulty; and I, therefore, to a certain extent sympathized with Mr. Healy when he desired the decision as to this fact of the learned Commissioner, who is the sole tribunal to determine any questions of fact.

But the learned Commissioner says that he has determined every question of fact relevant to the legal determination of the number of polling-stations; and that he is entitled to ask our opinion on the question whether those facts amount, in law, to a determination by the returning officer (who is the tribunal charged with the duty of so determining) of the number of the polling-stations; and, if so, what is the number so determined by him.

Upon this matter, I am of opinion that the learned Com-

missioner is right. I agree with Mr. Healy that the facts in the case stated amount in law to a determination by the returning officer that there shall be two, and only two, polling-stations.

Under rule 13 of the Urban District Councillors Election Order of the 22nd December, 1898, the returning officer is to determine the number of the polling-stations. No formality is prescribed as to the mode in which this determination is to be made, which consequently may be parol; nor is anything prescribed as to the notice to be given of it, save that not later than the 8th of January he shall give notice of their situation and allotment, and of the description of the persons entitled to vote at it.

On that 8th January the returning officer gave the candidates a written notice that "as there will be *two* polling-stations," they will be entitled to appoint a certain number of agents. It not having been shown that the returning officer had previously made any determination on that subject, this notice, in my opinion, amounted in law to, and was, a determination of the number; and that number *prima facie ought not* to have been changed after the 8th January, when the prescribed time for fixing the number expired.

I abstain from deciding that a change in the number of stations after that day would necessarily have rendered the election void. Had that question arisen, I should probably have held that, unless it were shown that the change *might* have affected the result, it did not avoid the election; that the error fell within the rule *quod fieri non debet factum valet*; but I hold that there was no such change. It is not found as a fact that there was. Even were there *evidence* of a change, we could not, from evidence, draw the inference that in fact there was the change.

I attach no weight to what took place on January 11th. The case finds that the nominations on the 11th, by eight of the respondents, of ten agents, and by six of the opposing candidates, of four agents, was *in response to* the circular of the 8th, which fixed the number of stations at two; and that the leave of the returning officer obtained later in the day by the agent of the opposing candidates to increase the number of their agents to ten, was applied for

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on the opposite agent learning of the nomination of the ten by the respondents. It is not found as a fact that on this 11th January there was any change by the returning officer in the number of the polling-stations; nor even that there was any belief in the mind of anyone that he had changed it. It would have been an irregular act to have made the change, after the prescribed time had expired; and the *bona fide* belief in the mind of the respondents' agent found by the case can have existed only through mistake, or through ignorance, of law. The conduct of the election was (save as to the number of agents allowed by the returning officer, to which I shall later on refer) much more in accordance with there being two, than with there being ten, polling-stations.

I, therefore, have not the slightest difficulty in holding that the validity of the election must be determined upon the basis that there were only two polling-stations at it.

Then, was the joint appointment by eight of the candidates of ten agents illegal?

In support of the affirmative of this proposition, rule 17 of the Local Government Board's "Election Order," of the 22nd January, 1898 (1), is relied on. That rule prescribes that if there are only two candidates, each of them may, in writing, appoint a polling-agent for each polling-station. If there are more than two candidates, any number of them, being not less than one-fourth of the whole number of candidates, may, in writing, appoint one polling-agent for each polling-station.

If this rule be not *ultra vires* of the Local Government Board, unquestionably the appointment of those agents was invalid. The question, then, is: is it *ultra vires*?

As well remarked during the argument, this rule, if construed literally (and I fail to see upon what other principle it can be construed), would prevent any agent being appointed, when there were three, but only three, candidates; and whatever construction be given to it, were there four candidates, each of whom stood on different political principles—say, a Unionist, an old-time Liberal, a Nationalist, and a Labour candidate—one agent

(1) Vanston's Municipal Corporation Acts, p. 427.

only could be appointed for the four; and to appoint even this one, the impossible task should be performed of the four candidates agreeing upon the one to be appointed.

Now, this rule appears to me to be in the teeth of sect. 24 of the Ballot Act. By that section, sections 92 to 96 of the 13 & 14 Vict. c. 69, are made applicable to personation under that Act.

The first of these sections (sect. 92) enacts that it shall be lawful for any candidate at an election to nominate an agent in his behalf to attend at *each* or any of the booths appointed for taking the poll at such election, for the purpose of detecting personation; and by section 93, a power is given to the returning officer to order the arrest of a voter, upon the declaration of any such agent. The Ballot Act substitutes the name of "polling-stations" for that of booths.

By article 5, sub-article 3, of the schedules to the Order of the Lord Lieutenant and Privy Council of 22nd December, 1898 (being the Order for Application of Enactments) (1), it is provided that at every election regulated by rules framed under this Order, the Ballot Act, 1872, shall, subject to adaptations, alterations, and exceptions made by rules of the Local Government Board, apply in like manner as in the case of a municipal election.

The rules thus referred to are rules which the Local Government Board are, by the same article, sub-article 1, authorized to frame. By that article, it is provided that the election of district councillors shall, subject to the provisions of the Act, be conducted according to rules framed under this Order by the Local Government Board. It is under the powers conferred by this sub-article that rule, No. 17, was made.

Now, I entertain a clear opinion that the "adaptations of, alterations in, and exceptions from," the Ballot Act, authorized by that article to be made by such rules, were such only as were necessary to apply, to the new elections authorized by the Local Government Act, the Ballot Act, as it was theretofore applicable to a municipal election; and that the subject-matter

(1) Vanston, Local Government, vol. i., p. 171.

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of the rules themselves was limited to procedure. There is not in the Local Government Act a trace of any intention of Parliament to repeal the 24th section of the Ballot Act, or to interfere with the right thereby conferred upon candidates. Rules, therefore, to be *intra vires*, should be consistent with that section; and, for that reason, I am of opinion that rule 17 is *ultra vires* and void.

The only other enactment, in relation to the number of agents, to which we have been referred, is sect. 13 of the Municipal Elections, Corrupt and Illegal Practices Act, 1884 (47 & 48 Vict. c. 70), which permits one polling-agent to be employed in each polling-station. No. 25 of the above-mentioned rules, *i.e.*, those of the 22nd December, 1898, provides that so much of this section as permits one polling-agent to be employed in each polling-station shall not apply, except so far as the employment of polling-agents is permitted by rule 17 of this Order.

This rule I hold to be *ultra vires* and void. The effect of its being so *ultra vires* is that section 13 applies to the election in question; and, by reason thereof, the appointment of the ten agents was illegal.

I now come to a much more important question: If so, was this illegal employment contrary to the principles in the body of the Ballot Act?

The contention that it was is based on this: that as under rule 26 the verbal direction of an illiterate voter (or, if the poll is taken on Saturday, of certain persons of the Jewish persuasion), is to be made "*in the presence of the agents of the candidates*," an illegal increase in the number of these agents is an infringement of the secrecy which it was the object of the Ballot Act to secure; and that an election which is conducted on a *system* which permits the presence of these unauthorized agents is contrary to the principles laid down in the body of that Act.

Upon careful consideration of the Ballot Act, I am of opinion that this contention is not sustainable.

The principles laid down by the Ballot Act, so far as they relate to secrecy, are to be found in its 2nd, 3rd, and 4th sections.

Section 2 must be construed, as must every other enactment, by a consideration of all the provisions of the Act in which it is

contained; and as the schedule to that Act is declared to be part of it, such schedule cannot be left out of consideration. Such was the decision in *Re Thornbury Division of Gloucestershire Election Petition; Ackers* v. *Howard* (1). But whilst the rules of the schedule cannot be excluded from consideration, it must be borne in mind that the *principles* in question must be found in the body of the Act itself.

It is clear that the Legislature considered that the body of the Act laid down the principles, while the rules in the schedule dealt with the machinery by which Parliament hoped that those principles could be effectually applied and enforced.

Of the three sections I have referred to, the second is the most important. It provides for a secret mark, and it is mandatory in requiring that that secret mark is to be printed on the back of each ballot-paper. The ballot-paper, so marked, is to be delivered to the voter "*within the polling-station*," and the voter, having secretly marked his voting on this ballot-paper and folded it up so as to conceal his vote, is to place it in a closed box in the presence of the officer presiding at the polling-station, after having shown to him the official mark on the back; in other words, it is to be placed in the ballot-box *in the polling-station.*

Section 3 (5) enacts that every person who fraudulently takes *out of the polling-station* any ballot-paper shall be guilty of a misdemeanour. This presupposes that the taking a ballot-paper out of the polling-station, even without a fraudulent intention, is forbidden by the Act; and it is capable of demonstration that, if one ballot-paper be taken out of the polling-station during the election, an innumerable number of unmarked ballot-papers may be taken out successively, may be filled up to the knowledge of a candidate or his agent, and may be afterwards deposited in the ballot-box, so filled up; so that no guarantee of secrecy can possibly exist. For this reason I deduce this, that one, at least, of the principles of the Act is that a ballot-paper shall not be taken out of the polling-station.

For this reason, had I come to the conclusion that there

(1) 16 Q. B. D. 739.

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were ten polling-stations at the election, I should have held the election to have been void, because there was no possible arrangement by which the portion of the gallery alleged to contain five polling-stations could be so divided that a voter could obtain his ballot-paper at one of the tables, go with it to one of the compartments for marking, mark it there, and then deposit it in the ballot-box, without taking the ballot-paper from one station into another.

I cannot, however, find in this section any provision as to secrecy, other than that the ballot-paper shall be secretly marked, that it shall be folded up so as to conceal the vote, that it shall be placed so folded in a closed box, in the presence of the presiding officer. The section does not deal with the number of persons who may be present in a polling-station; neither does section 3, which deals with offences; nor does section 4, which provides that every officer, clerk, and agent in attendance at a polling-station shall maintain, and aid in maintaining, the secrecy of the voting; that no person shall interfere, or attempt to interfere, with a voter when marking his vote, or otherwise attempt to obtain in the polling-station information as to the candidate for whom the vote is given, or communicate at any time to any person any information obtained in the polling-station as to the candidate for whom a vote is given, as to how an elector voted, or as to the number on the back of his ballot-paper; and it enacts that every person who acts in contravention of the section shall be liable to imprisonment. This section, as I have said, does not limit the number of persons to be present in a polling-station; its effect is to prohibit, under a penalty, persons who are present from giving unauthorised information.

Taking, then, all the material sections of the Act into consideration, I am of opinion that, although the presence in a polling-station of an undue number of agents is contrary to the principles of the Municipal Elections Acts, 1884, it is not contrary to the principles laid down in the body of the Ballot Act, within the meaning of sect. 13 of that Act.

I have not overlooked rule 26 in the schedule to that Act, which contemplates the presence of the agents of the candidates

when an illiterate voter (or, if the poll be taken on Saturday, possibly a person of the Jewish persuasion) declares by word of mouth, and, consequently, in the hearing of the agents, the person for whom he votes; but, in my opinion, the only principle in the body of the Act applicable to those agents is not that they shall be limited to any particular number, but that any of them who unlawfully discloses the vote shall be liable to punishment under section 4.

Upon the whole, then, I am of opinion that the presence of the excessive number of agents in the polling-station, although illegal and contrary to the rules in the schedule to the Ballot Act, was not contrary to any principle laid down in the body of that Act; and that, consequently, the election cannot, upon that ground, be declared void.

As to the argument which we have heard, that the illegal practice involved in the appointment of this excessive number of agents would constitute a ground for avoiding the election, unless duly excused by the Commissioner, my opinion is that we cannot say whether or not the election will be avoided thereby, until the learned Commissioner shall have determined whether the respondents are entitled to be excused. The case cannot have intended to reserve this question for our consideration, as it is not a matter capable of present determination; and whatever may be the answer which may be given by this Court, the effect of this illegal practice by the respondents will thereafter remain for the decision of the learned Commissioner; and if it be not excused, the election must be declared void, not by this Court, but by the Commissioner himself.

JOHNSON, J.:—

The petitioners do not appear to have suffered any individual grievance, but have come forward to complain that this election was not conducted according to law. The case stated by the learned Commissioner submits (subject to the decision of this Court on the questions reserved and indicated in paragraphs 19 and 20) whether this election should or should not be declared void under sect. 93, sub-sect. 8, of the Act of 1882 (45 & 46 Vict. c. 50); and the Commissioner has postponed the granting of his certifi-

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cate until these questions have been determined. In my opinion, this election should not be declared invalid and void. The principles of the Ballot Act of 1872 are that voting should thenceforth be by ballot instead of open voting, that the election should be absolutely free so that every elector may record his vote for the candidate of his choice, and that the ballot shall be secret. The schedules to the Act contain rules framed for carrying into effect the principles of the body of the Act; these rules are directory, and are so distinguished in construction from the enactments in the body of the Act, and substantial (not literal) compliance with their provisions is sufficient: *Woodward* v. *Sarsons* (1). Section 13 of the Ballot Act, 1872, in the body of the Act, provides that no election shall be declared void by reason of non-compliance with, or mistake about, the rules or forms in the schedules to the Act, if it appears to the tribunal, having cognizance of the question, that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election. To a similar effect is sect. 13 of the Election Order, 1898. Paragraph 18 of the case finds as a fact that the returning officer's arrangements were made with a *bona fide* desire as far as possible to facilitate electors and to prevent confusion and delay in the polling place, and in the opinion of the learned Commissioner they did so operate. Paragraph 19 sets out the petitioners' objections in reference to the appointment of agents. The Lord Chief Baron has discussed this matter fully, and pointed out the irregularities which occurred; and, without going in detail through them again, I think it sufficient to say that the learned Commissioner of large experience in this branch of the law states, in paragraph 23, that he personally inspected in presence of counsel and solicitors of all parties the place in which the polling was carried out, reconstructed as it was on the day of polling (15th January), and says—"I found as a fact that it was well suited and arranged for such a purpose, at a convenient centre for the electors" (4874 in number, as Mr. Healy informs us), "and affording ample room, and that there was no structural obstacle to the full view by the presiding officers at each side of the gallery over the

(1) L. R. 10 C. P. 733.

intermediate floor space." For decision of this case, I prefer this finding after personal observation in the presence of the parties to any plan of the premises, and the Commissioner finds, as I have already stated, that the arrangements for the poll were made with a *bona fide* desire, as far as possible, to facilitate the voting and prevent confusion and delay, and did so operate in his opinion. As to the ballot-boxes, the schedule was not literally complied with, but before the opening of the poll, four boxes were duly shown open and sealed up again; another box was similarly dealt with and kept in reserve until the afternoon; and in case these boxes should not be sufficient, two more boxes, on the premises from the opening of the poll, were brought into use. About two o'clock p.m. one of these boxes was brought into use, and before it was used and in the presence of the agents for the parties it was opened, shown empty, and sealed up; and about seven o'clock p.m. the other box was similarly dealt with. These are the questions indicated in paragraphs 19 and 20 of the case with which we are to deal, and upon which the opinion of the Court is asked. Finally the learned Commissioner finds as facts as follows:—(*a*) That at the polling on the 15th January, 1908, every elector who attended for the purpose of voting had a full and free opportunity of recording his or her votes or vote for whichever candidates or candidate he or she preferred or chose; (*b*) That the said election was conducted in accordance with the principles contained in the body of the Ballot Act, 1872, and of the Local Government (Ireland) Act, 1898; (*c*) That if any of the matters complained of by the petitioners, and stated or referred to in this case, were or was a non-compliance with, or a non-observance of, or a departure from, any of the requirements of or under the rules or the forms in the schedule to the Ballot Act, 1872, or of or under the rules of the Election Order of the 22nd December, 1898, the same or any of them did not in any way affect the result of the said election. With the findings of fact by the Commissioner I have no authority to interfere. In my opinion, notwithstanding these admitted irregularities, the election was conducted in accordance with the principles laid down in the body of the Ballot Act and the Election Order, 1898, and the result of the election is found not to have been affected by any of these irregularities.

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I therefore think, in answer to the question in the case, that the election ought not to be declared irregular and void.

WRIGHT, J.:—

I concur in the judgment that has just been delivered by my brother Johnson, and for the reasons that he has given. I have nothing to add.

DODD, J.:—

It has not seemed fit to the Legislature to enable this Court to review or control the tribunal appointed for inquiring into and determining facts. On an election petition our jurisdiction is limited to the determination of such questions of law as the Commissioner may submit.

One of the questions he had to decide would seem to be a mixed question of law and fact. The Commissioner has, with considerable astuteness, endeavoured to separate the facts from the law, so as to enable him to do what alone he is entitled to do, state a case for this Court on a question of law.

He says in substance, I find such and such facts. Unless these facts are sufficient to prevent me, I am prepared, upon a review of the entire evidence, to arrive at the conclusion that the election was held in accordance with the principles contained in the body of the Act. He then sets out certain matters of fact, and mentions in detail the arrangements made for the voting, and substantially puts this question to this Court: Are these facts so found by me inconsistent with the finding which but for them I should arrive at, that the election was not void? Ought I, on these facts (meaning am I compelled by these facts), to find that the election is void? It is to be observed that he does not set out the whole evidence, or, indeed, any of it; nor does he refer to the matters that induce him to find as he proposes to find. What he does ask is, In face of these particular facts set out, am I at liberty to find as I propose to find? I suppose this does, in some sort of way, raise a question of law, though the decision of Mr. Justice Mathew in *Preece* v. *Harding* (1) would appear to be the other way.

(1) 24 Q. B. D. 110.

What are the facts so found? What were the arrangements made?

The returning officer thought he had in a building of the Royal Dublin Society's show-ground a place where the entire election could conveniently be held. He thought he could take advantage of the two large galleries to have two polling-stations, each gallery being large enough to provide accommodation for about half of the voters. He determined to have one polling-station for each side of the gallery.

He provided that there should be five tables in each of the stations, and a clerk at each table, having all the necessary materials for giving out ballot-papers. The papers were to be put in a ballot-box at some distance from the table, the ballot-box being under the direct care of the presiding officer. He further separated in each station the ballot-papers of voters who were unable to make their mark from the rest of the ballot-papers, and these votes, which had to be marked by the returning officer, were put into a ballot-box by themselves, presided over by a special presiding officer. The result of all this is that it is a matter of doubt how many polling-stations there were in fact. There were but two according to the determination of the returning officer. There were, however, four presiding officers, possibly five, and there were ten persons who, in fact, for all practical purposes, were presiding officers, inasmuch as each had a separate portion of the register, and the official stamp, and marked and gave out ballot-papers, and the candidates say, from their point of view, there were ten polling-stations.

This was clearly a departure from the rules, and Mr. Healy's observations as to the importance of maintaining the inviolability of secrecy are of great weight, and most of his propositions on the facts assumed by him are propositions that commend themselves to me.

The framers of the Ballot Act were called upon to accomplish two apparently conflicting objects: one was to secure that the voting be secret; the other was to provide a machinery under which it would be possible for an election tribunal, in the case of any one individual, to find out his paper, and reject it if such became necessary.

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A complicated machinery was devised which has been efficient to attain both objects. But another danger had then to be guarded against. If all these details must be observed in each election with minute accuracy, it would be almost impossible to have an election at all. To guard against this danger the provision so much referred to in the arguments before us was made. Details are of great, but not of vital, importance. If the tribunal having cognizance of the question is satisfied that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election, the election shall not be declared invalid.

The principles of the ballot that are alleged to be infringed are (1) that the arrangements were such as to violate the secrecy of the ballot, and this as a matter of law ; and (2) that the provisions of the Act as to polling-stations are a matter of principle as distinct from machinery, and the controversy turns on this. The word "polling-station" is to be found in the body of the Act. A polling-station is an essential part of the machinery of the Ballot Act. To enable the voting-papers to be identified in case of a scrutiny, and at the same time to preserve secrecy, is the principle. An election, say by voting beans, would, even though by ballot, not be an election in accordance with the principle of the Act. All the elaborate arrangements are made necessary to secure both objects; the materials for the election in each polling-station have to be carefully preserved for possible future investigation, and meantime have to be carefully kept secret. The second principle, according to counsel for the petitioners, is that the voting-paper must be given to the voter in the polling-station, and must not be taken by him out of it; and inasmuch as there is a dispute as to the actual number of polling-stations, this Court, it is said, cannot deal with the matter properly, unless further facts are found than those submitted, and we are asked to send the matter back for a finding on that question. The Court has held, or will hold, that we cannot do this. But we have, in my opinion, sufficient material to enable us to arrive at a conclusion. I think there can be no doubt that the returning officer determined that there should be two polling-stations, and only two, one on each gallery. If a scrutiny were

needed, all the papers, books, blocks, and ballot-papers would be found to be in accordance with that view; and if that be so, even assuming this to be a principle of the ballot, it was not violated, for each voter got his paper and deposited his paper in the same polling-station. I guard myself against deciding that even if there were ten stations, and the voters were not separated by actual physical boundaries, there would be necessarily such a violation of the principle of the Act as to make the election void. I am inclined to think, speaking only for myself, that the ensuring of secrecy, and the preservation of the means of ascertaining the actual vote in case of a scrutiny, is the principle in the body of the Act, and a departure even in the matter of polling-stations would not necessarily and as a matter of law be contrary to the principles of the Act.

The matter is pressed strenuously, because if there be in fact two stations it is alleged that there was an illegal employment, inasmuch as there could be only two agents, instead of the ten actually appointed. That I shall deal with later on. At present we are concerned with such matters as are conversant with the acts of the returning officers. Before I part with this branch of the case, I desire to state that I think there is another principle of vital importance. It is not contained in express words, but it underlies the entire machinery of the Ballot Act. It is assumed, if not stated in express terms. The candidates have a right to have agents present in the polling-stations for the purpose (*a*) of preventing personation; (*b*) seeing that the officials carry out the election properly; and (*c*) for seeing that secrecy is ensured.

Take section 4 of the Act—"Every officer, clerk, *and agent* in attendance at a polling-station" shall do, and refrain from doing, as in the section enacted. Take rule 21, and for my present purpose it is legitimate to have regard to the rules for the purpose of seeing how the rules interpret the Act on this matter:—The presiding officer shall exclude from the polling-station all persons except the clerks, *the agents* of the candidates, and the constable on duty. And that suggests that each candidate is entitled to have one agent in each station. And, speaking for myself, I am inclined to think that, if the tribunal having cognizance of the question found that the arrangements were such as to deprive the candi-

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dates of this right, it might well come to the conclusion that one of the principles in the body of the Act had been infringed. I think it is a constitutional right, confirmed and recognized by statute.

Has, then, any principle of the Ballot Act been infringed, and has the result of the election been affected thereby? That was for the tribunal appointed to decide questions of fact.

It would not be becoming in me to dwell upon the great experience, knowledge of electoral law, and competence of the learned Commissioner. He had a difficult and delicate task. If the arrangements were such as to put the secrecy of the ballot in peril, even if they were such as to lead voters to believe that the election was not really secret, then the Commissioner would be justified in declaring the election void. But these are entirely questions of fact. The evidence on this, which was before the Commissioner, is not before us. If in the opinion of the tribunal the election was substantially an election by ballot, in accordance with the principles in the body of the Act, and the result was not affected, then no mistake or misconduct, however great, in the machinery of the Ballot Act, could justify the tribunal in setting aside the election. I am of opinion that all the matters referred for our decision by the Commissioner in the case are matters of mistake, or erroneous procedure on the part of the returning officer, and are not facts from which an inference must necessarily, or even reasonably, be drawn that the election was contrary to the principles in the body of the Act.

It is to be steadily borne in mind that we are dealing here with the acts of officials. Mr. Healy in dignified and impressive words warned us that a great constitutional question was involved, and that a decision upholding this election would be fraught with peril to the rights of the people. I think the peril lies in the other direction. To put it in the power of a returning officer by his own wilful or erroneous act to set at naught the result of the election honestly held, so far as candidates and electors are concerned, would be a very serious danger to constitutional rights. It would be a temptation to a partizan official to force a new election. If the side to which he was opposed seemed likely to win, he could rob them of victory by a violation of rules. There is another constitutional right we should put in peril if we did as

he asks us to do in this case. We should be assuming to this Court power to review and control on a question of fact the tribunal to which, and to which alone, Parliament has assigned the duty. Mr. Healy's argument would put the result of elections at the mercy of the returning officer, and would enable the Judges of the High Court to assume the functions of an election tribunal. It is our duty to make other tribunals keep within the law. We must be careful ourselves to keep strictly within the line of our own duties.

The election is challenged, however, on the acts of the candidates. It is alleged they have been guilty of illegal employment. Speaking for myself, I think this ground is not a ground for setting aside the election. It is or might be a ground for unseating a person elected, and no question on that has been submitted to us. But what is the alleged illegal act? Only one is suggested. It is said to be a violation of the rule that in each polling-station there can be only one agent for a group of candidates, and that where only two should have been appointed, ten were in fact appointed.

There is nothing in the Ballot Act limiting the number of agents for each candidate. Section 13 of the Municipal Elections Act, 1884, restricted each candidate to one polling-agent for each polling-station. That provision of the Act of 1884, however, is not made applicable by the Order of 22nd December, 1898. Rule 25 (4) runs:—"So much of sect. 13 of the Act as *permits* [sic] one polling-agent to be employed in each polling-station shall not [apply, except so far as the employment of polling-agents is permitted by rule 17 of this Order." Now, that section did not permit one agent. That had already been permitted by the Common Law and the Ballot Act. The section restricted each candidate from appointing more than one. But passing that by, we come to rule 17 of the Order (Vanston, p. 250). The only provision now making the employment of more than one agent illegal is to be found in that rule. And if the rule made deprives a candidate of a right given to him by statute, I am of opinion it is *ultra vires*, and for the reasons I have given I think each candidate had such right. The Chief Baron has stated this so fully that I do not dwell on it. I adopt his reasons, and his result.

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In re Pembroke Election Petition.

Dodd, J.

I do not wish to rest my judgment upon the rule being *ultra vires*. That was not argued before us, and though I arrived at the same conclusion independently, I prefer not to make this an integral part of my decision. The difficulty I feel on this part of the case is that if there had been only two candidates, and the arrangements had been as they are here, I should still have thought that an agent at each table was an essential precaution to ensure a due election conducted in accordance with the Ballot Act.

If the proceeding of the returning officer was regular, it would seem to me that the only way of preserving and observing the principle of the Act would be by having an agent at each place where in fact papers were given out to electors applying for them; and such a table as herein described would, from the candidates' point of view, be a polling-place—call it polling-station if you will—within the meaning of the rule.

But if the proceeding was irregular, as I think it was, but that the irregularity was such as not to avoid the election, then I am face to face with this fact, that the act alleged here to be illegal was one rendered necessary by the act of the returning officer, and was therefore an act in favour of, and not against, the principle of the Act. To condemn the candidates, and then excuse them, would be equivalent to convicting a man for the purpose of granting him a free pardon.

If the rule be within the powers, it can only be so on getting a reasonable construction. The object of the rule is to provide one agent for a group of candidates; but for what reason? I suppose to prevent the polling-station from being crowded, and to limit expense. But this limitation could only be justified if there remained an efficient check on possible breaches of the Act by an adequate number of agents. Can it get such a construction? It could get such a construction if every person who, at a separate table, was appointed to discharge the duties set out in rule 24 of the schedule to the Ballot Act be deemed to be a presiding officer. And, for the purpose of appointing agents, each such table should be deemed a polling-station. If it cannot get such a construction, then it is wholly bad, for it violates what, for the reasons I have mentioned, I regard as

a principle of the Act. The candidates, in my opinion, were within their right in demanding proper inspection and proper agents for their own protection and the proper carrying out of the Act. They appealed to the returning officer. He conceded the justice of the demand. Let there, if you will, be two polling-stations from the returning officer's point of view—from the candidates' there are ten. The two hands of a person may be adequately protected by two fingerless gloves; but if each finger is to have separate action, the gloves must be constructed so as to give a covering to each finger. I have no difficulty in arriving at a result which will give both two and ten. The difference of opinion in the Court does not seem to me to be of much moment. Even if it were an illegal act, it is such an illegality that any tribunal would excuse for the asking. I do not think it is an illegality that would unseat a person elected. But I prefer not to brand as an illegal act on the part of a candidate, an appointment that was forced upon him by the conduct of the returning officer, and was, in fact, a precaution necessary to preserve the principle of the Ballot Act, which the conduct of the returning officer in departing from the rule was putting in peril. I prefer, therefore, simply to answer the question, No!

Solicitor for the petitioners: *M. J. O'Farrell.*
Solicitors for Mr. Manly: *D. & T. Fitzgerald.*
Solicitors for the other respondents: *Hamilton & Craig.*
Solicitors for the Commissioner: *Moorehead & Wood.*

J. L.

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THE GUARDIANS OF THE POOR OF THE ABBEYLEIX UNION *v.* DE VESCI (1).

11 & 12 *Vict. c.* 47, *s.* 2—*Eviction—Room in a dwelling-house situate in a town —Omission to give notice to relieving officer—"Inhabited dwelling-house or building used as a dwelling-house."*

Section 2 of 11 & 12 Vict. c. 47 applies to a single room held and occupied by a tenant in a dwelling-house situated in a town.

Case Stated by the Lord Chief Justice of Ireland at the Queen's County Summer Assizes, 1907. The Case Stated was as follows:—

The civil-bill in this action claimed £20, being the amount of a penalty forfeited by the defendant, and payable to the plaintiffs under sect. 6 of the 11 & 12 Vict. c. 47—an Act for the Protection and Relief of the Destitute Poor evicted from their dwellings in Ireland—by reason of the defendant neglecting and omitting to serve notice in writing, as required by the provisions of said Act, on the relieving officer of the Abbeyleix Electoral Division of the execution of a decree, or order, or warrant, for possession, by or on behalf of the defendant against one Peter Lawlor, for possession of a room in a house in the town of Abbeyleix, situate within the electoral division of Abbeyleix aforesaid, which said decree, order, or warrant for possession, was duly executed on the 11th day of February, 1907. It was heard by the County Court Judge for the Queen's County during the Easter Sessions of 1907, who gave a decree in favour of the plaintiffs against the defendant for the said sum of £20. From this decision the defendant duly appealed, and the appeal was heard before me at Maryborough, as Judge of Assize, on the 5th day of July, 1907.

It appeared in evidence, and I found as facts—(1) That the defendant, Lord de Vesci, was landlord of a two-storied house,

(1) Before Palles, C.B., and Andrews, Johnson, and Kenny, JJ.

with yard attached thereto, situate in the town of Abbeyleix. (2) That a room in said dwelling-house, on the ground-floor of said dwelling-house, was held by one Peter Lawlor as tenant from the defendant at the weekly rent of 6*d.*, under an agreement dated the 19th day of May, 1906. (3) That the remainder of the said house was in the occupation of another person. (4) That the said Peter Lawlor was allowed to use a yard at the rear of the said house; but the said yard was not included in Peter Lawlor's tenancy. (5) That the defendant duly determined by notice to quit, dated 21st January, 1907, the tenancy of the said Peter Lawlor in the said premises, and issued a summons under section 15 of the 14 & 15 Vict. c. 92, for recovery of possession thereof. The summons is in the following terms:—"A house and premises situate in the market-town of Abbeyleix, Queen's County." (6) The said summons was heard at the Abbeyleix Petty Sessions on the 2nd day of February, 1907, whereupon, and on hearing the same, the Justices issued a warrant in pursuance of the provisions of said section for recovery of possession by the defendant of the said room in said dwelling-house. (7) The said order or warrant for possession was executed by the defendant on the 11th day of February, 1907, when possession was taken of the said room in said dwelling-house, and the said Peter Lawlor, and his wife and five children, were evicted. (8) No notice of execution of said order or warrant was served by the defendant, or his agent, or at all, upon the relieving officer of the electoral division in which said premises are situate, as required by the provisions of the 11 & 12 Vict. c. 47. (9) The said Peter Lawlor and his family were destitute, and were obliged to receive immediate relief from the plaintiffs. (10) That in previous evictions by Lord de Vesci of premises in the town of Abbeyleix no such notice on the relieving officer was served.

Mr. D. G. Chaytor, K.C., and Mr. D. J. O'Brien (instructed by P. J. Meehan, Solicitor), appeared for the plaintiffs; Mr. T. S. F. Battersby, K.C., and Mr. C. H. Corvan (instructed by Bridge & Rolleston, Solicitors), appeared for the defendant, who contended that he was not liable upon the grounds: (1) That the statute 11 & 12 Vict. c. 47 did not apply to a dwelling-house in a town.

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(2) That in any event the said Act did not apply to a separate tenement, a room in a dwelling-house.

I asked counsel for the plaintiffs and the defendant if they were willing that I should state a case, and counsel for both plaintiffs and defendant consented thereto.

The questions for the opinion of the Court are:—

1. Whether the statute 11 & 12 Vict. c. 47 applies to a dwelling-house situate in a town.

2. Whether there is any evidence that the premises in question were a dwelling-house within the meaning of the said Act.

3. Whether the said Act applies to a separate tenement—a room in a dwelling-house.

O'BRIEN.

29th November, 1907.

Ronan, K.C., and *Chaytor, K.C.* (with them *D. J. O'Brien*), for the plaintiffs:—

The title of the Act, viz. "An Act for the Protection and Relief of the Destitute Poor Evicted from their Dwellings in Ireland," shows that its object was to provide protection for the destitute poor evicted from their dwellings *anywhere* in Ireland. Destitute poor in towns were within the mischief sought to be remedied. There is nothing to limit the operation of the Act to dwelling-houses standing on agricultural land. The room occupied by Peter Lawlor was "a dwelling-house, or building used as a dwelling-house," within the meaning of section 2.

[They referred to *The Guardians of the Poor of the Kilmallock Union* v. *Saunders* (1); *Guardians of the Poor of Athy Union* v. *Pratt* (2); *Electric Telegraph Co.* v. *Overseers of Salford* (3); *Rogers* v. *Hosegood* (4); *In re Hecquard* (5); *Domvile* v. *Colville* (6); *Fenton* v. *Thorley* (7).]

(1) 20 L. R. Ir. 121.
(2) 16 L. R. Ir. 459.
(3) 11 Ex. 181.
(4) [1900] 2 Ch. 388.
(5) 24 Q. B. D. 71.
(6) I. R. 7 C. L. 68.
(7) [1903] A. C. 443.

Battersby, K.C. (with him *Corvan*), for defendant:—

The 11 & 12 Vict. c. 47 is a piece of exceptional legislation, having its origin in the distress in the agricultural districts of Ireland at the time of the famine. The wholesale evictions on Christmas Day, 1847, explain the provision in sect. 1, that no *habere* was to be executed on Christmas Day; the universal practice of unroofing peasants' cottages on eviction is made a misdemeanour by sect. 7; while the historical fact of the crowds of starving and helpless families was met by sect. 4, which provides for their conveyance to the workhouse. The controlling word in the Act is "land," and the main fact with which it deals is "eviction of land." The words "townland," "county," "land-owner," all point to rural districts, and ejectment from land, not ejectment from houses, was contemplated. "Land" did not necessarily include houses in 1848: see Interpretation Acts, 1850 (1), section 4, and 1889 (2), section 3. "Land" does not include houses when it occurs in juxtaposition: *Portal* v. *Lamb* (3). In section 2 "lands," "dwelling-house," and "building" occur, and the distinction occurs throughout the Poor Law Code, as, for instance, in 1 & 2 Vict. c. 56, sects. 35 and 63; 6 & 7 Vict. c. 92, sect. 7. "County," again, did not include "county of a city" until the before-mentioned Interpretation Acts.

The provisions as to notice in section 2 could not be complied with in towns—there are no townlands in the city of Dublin. What information would it be to a relieving officer to be informed of an intended eviction of land in the parish of Baggotrath and electoral division of Stephen's Green? If towns had been in contemplation, names of occupiers, streets, and number of house would have been required.

But here there was neither "house" nor evicted land. A room is not a house except under the Representation of the People Acts. Part of a house is not a house: *Cook* v. *Humber* (4). As to "building," "the ordinary and usual meaning is a block of brick or stone work covered by a roof": *per* Esher, M.R., *Moir* v. *Williams* (5). If possible, language must be construed in its popular sense: *Grenfell* v. *Inland Revenue* (6); and the meaning of the words of

(1) 13 Vict. c. 21.
(2) 52 & 53 Vict. c. 63.
(3) 30 Ch. D. 50.
(4) 11 C. B. (N. S.) 33.
(5) [1892] 1 Q. B. 264.
(6) 1 Ex. D. 242.

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this Act must be the meaning attached to them at the date of its passing on August 14, 1848.

The English Poor Law Act was passed on the 4th September, 1848, and it contains no such exceptional legislation, the inference obviously being that the Irish Act was passed, not to meet the case of ordinary town evictions, which would call for legislation at least as much in England, but to meet some pressing need in Ireland. The words must not be strained against the defendant, and an offence cannot be extended by implication: *R.* v. *Smith* (1).

PALLES, C.B.:—

Two questions have been argued here—First, whether sect. 2 of 11 & 12 Vict. c. 47 applies to houses in a town; and secondly, whether an inhabited room in a house in the town of Abbeyleix is "land on which there is an inhabited dwelling-house" within the meaning of that section, so as to impose upon the defendant (who procured the execution of an order for delivery of possession of it) the obligation of serving on the relieving officer the notice mentioned in that section.

As to the first question, the exclusion of land and houses in towns from that section is rested upon the words in the section "any county." These words, it is alleged, ought to be construed, county at large, so as to exclude counties of cities and counties of towns. Even were this the true meaning of "any county" as used here, it would not fulfil the purposes for which its aid is here invoked, as Abbeyleix is in the Queen's County, a county at large.

As, however, we are told that the practice as to serving or not serving this important notice varies in counties of cities and towns, and as it is desired to have a decision upon the question of construction—a question which has been fully argued—we think it better to express our opinion upon it.

For myself, I entertain no doubt that the expression "any county" as used in the section means every county, and includes counties of cities and counties of towns.

(1) 1 C. C. R. 266.

This is undoubtedly its *prima facie* meaning. It would require some assisting context to restrict it in the mode suggested. The assisting context is said to be found in the words at the end of the section descriptive of the contents of the notice, and in the occasion for the passing of the Act, the deplorable Irish famine of 1846–47, which, it is suggested, shows that the grievances sought to be remedied by the Act were confined to agricultural land.

Here again I have to observe that the limitation sought to be imposed does not correspond with that which might be suggested from the alleged nature of the grievance, because there was at the passing of the Act, and there still is, much agricultural land in counties of cities and counties of towns.

I proceed, however, to consider the grounds of the suggested limitation. First, as to the prescribed contents of the notice. They are "the parish or barony, electoral division and townland in which the land of which possession is to be so delivered" is situate.

No doubt it might have been more convenient had there been a direction that if the lands were within a city or a town, the street, and the number (if any) in that street of the house on the land, should be stated. But as in law the words used, especially "parish," can describe part of a city or town, this consideration is not *per se* sufficient to work the limitation suggested. The omission of the word "street" might possibly be a circumstance for consideration in conjunction with others leading in the same direction, and I do not wholly reject it; but, taking it with all the other circumstances, I do not think it entitled to a feather's weight.

Coming, then, to the occasion of the Act, the famine I have referred to, I hold it to be erroneous to assume that the mischief to be remedied did not extend to cities and towns.

The mischief was the fact that the evicted destitute poor, who were turned out in numbers on the roadside, were left there without lodgings or food, in some instances to die of starvation and hardship. It is a matter of history thousands of thousands so died.

There is not a trace in the Act of the opinion of the Legislature that this mischief did not extend to the towns. As a matter

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of fact, it did so extend. The instinct of persons evicted in the country parts of the kingdom was to struggle to the nearest town; and I am myself old enough to remember the names of two towns in the south of Ireland—"Schull" and "Skibbereen"—being used in general conversation as places typical of the worst horrors of the famine. Again, the destitution which primarily affected those supported by the land necessarily spread to those who made their living in the towns. It extinguished their trade, and often reduced them to such a condition as to compel them to seek union relief. These facts are now matters of history; they were then well known to Parliament. The remedy provided for this state of things was the extension of the class of persons entitled, under 10 Vict. c. 31, sect. 1, to receive out-door relief, so as to include poor persons evicted from their dwellings; and the object of the forty-eight hours' notice to the relieving officer was to give him time to have this out-door relief ready when required, *i.e.* at the eviction. It, therefore, was an essential part of the machinery provided for effectuating the prescribed remedy. This remedy is not in words limited to persons evicted from houses on agricultural holdings or from houses in counties at large, and were it so limited it would not be co-extensive with the mischief. Indeed, the words of the Act show that Parliament, in its anxiety to provide an ample remedy, went beyond the mischief then in immediate contemplation. The famine must have been regarded as temporary; yet the Act is not limited in time. The obligation to serve the notice, and the extension of the class entitled to out-door relief, are both made perpetual.

As to the second question, too, in my opinion, Mr. Battersby's argument fails.

Prima facie "land" in an Act of Parliament includes a house built on that land. But that *prima facie* meaning may be altered by the context in which it occurs. Of this there is a familiar example in our General Valuation Code, in which "land" and "house" have meanings mutually exclusive of each other. It is unnecessary therefore to discuss or refer to the numerous cases cited in this part of the case, all of which arose on Acts of Parliament other than that upon which the question here arises. The proposition which we are invited to adopt on that Act is

that "house" does not include the portion of land upon which it stands, and that that portion of land is not "land" within the meaning of the section.

My view is quite the opposite. The subject-matter of the land is not land generally, but "land on which there shall be an inhabited dwellinghouse," so that house is used as meaning a structure. If the land be a farm, the existence on it of that structure brings it within the Act; and but for the argument we have heard, I should have thought that it was idle to say that from that land was to be excluded that portion of it which was covered by the house. To do so would be to do violence to the word used, "land," and the effect of so doing would be to exclude from the beneficial provisions of the Act cases plainly within both the mischief and the remedy.

The decree of the County Court Judge appealed from was, in my opinion, right, and should be affirmed. The question of the Lord Chief Justice should be answered accordingly, and the defendant must pay the costs of the argument.

ANDREWS, J.:—

The questions reserved to our opinion in this special case may be summarized in one, namely, Do the provisions of the Act 11 & 12 Vict. c. 47, relating to notices to relieving officers apply to a certain room used as a dwelling, and held separately in a dwelling-house situate in a town? The material facts as substantially found by this special case are the following, viz.:— Lord de Vesci was landlord of a two-storied house in the town of Abbeyleix, a room in which was held separately, and inhabited by Peter Lawlor as a weekly tenant; and his tenancy having been determined, Lord de Vesci obtained a Justices' warrant for the execution of a Justices' order against Peter Lawlor to be ejected from the room in question, the authority given by the warrant being to enter and give possession of the room to Lord de Vesci or his agent. This process was executed on behalf of Lord de Vesci by taking possession of the room, and evicting therefrom Peter Lawlor, and his wife and five children, who were destitute, and were obliged to receive immediate relief from the

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plaintiffs, the Guardians of Abbeyleix Union, and no notice as required by the 2nd section of the Act was given, before the eviction, to the relieving officer of the electoral division in which the house containing the room in question was situate. The plaintiffs, the Guardians of the Abbeyleix Union, in which this house was situate, then proceeded to recover from Lord de Vesci by a civil-bill action the penalty of £20 imposed by the 6th section of the Act for the omission to serve the notice required by the 2nd section, and the County Court Judge gave the plaintiffs a decree for £20 accordingly. On an appeal, which came before the Lord Chief Justice, as Judge of Assize, against this decree, the special case before us was stated pursuant to section 35 of the Act 27 & 28 Vict. c. 99. The question we have to determine does not appear to have become the subject of any previous judicial decision, and it depends upon the construction of the 2nd section of the Act 11 & 12 Vict. c. 47, which provides that not less than forty-eight hours before the execution in any county in Ireland of any process for delivering up or taking possession "of land, on which there shall be any inhabited dwelling-house, or building used as a dwelling-house," the person on whose behalf the process shall have been sued out, or his agent, shall give the thereby prescribed notice to the relieving officer of the electoral division in which the land is situate. This notice ought to refer to the process, and state sufficiently where the dwelling to be taken possession of is situate. If it be in a townland, the townland ought to be stated, but the Act is not, in my opinion, limited to dwellings in townlands. The 6th section imposes the penalty of £20 for neglecting or omitting to serve this notice.

The title of this Act is, "An Act for the protection and relief of the destitute poor evicted from their dwellings in Ireland," and the generality of the Act is apparent both from its title and its preamble. I think it clearly applies to the whole of Ireland. Peter Lawlor and his family were destitute poor, and were evicted from their dwelling. They plainly came within the relief which the title and preamble of the Act indicate was intended to be provided for such persons. The preamble of the Act recites that it is expedient . . . "to provide for the better relief of the destitute poor evicted from their dwellings in Ireland," and there is, so far,

no restriction of the relief to any particular kind of dwelling, or to dwellings situate in any particular locality. Destitute poor evicted from a dwelling in a town may, by reason of their destitution, have required when the Act was passed, and may still require, the relief provided by the Act as well as destitute poor evicted from a dwelling in the country. The 2nd section describes the premises to be taken possession of under the process for that purpose as "land on which there shall be any inhabited dwelling-house, or building used as a dwelling-house." The two-storied house, which contained the room held by Peter Lawlor, was an inhabited dwelling-house, and the room was his dwelling; and, having regard to the expressed intention of the Act in its title and preamble, I entertain no doubt that the room held by Peter Lawlor comes within the descriptive words "land on which there shall be any inhabited dwelling-house or building used as a dwelling-house." It was clearly a "dwelling" within the meaning of the Act, and was also a building used as a dwelling-house by Peter Lawlor and his family within the meaning of the 2nd section, and it stood upon land. A dwelling-house may be properly described as a building which gives shelter to those who dwell in it, which the room in question gave to Peter Lawlor and his family; and it was not the less their dwelling-house because it did not include the entire building. I see no reason against holding that there may be two or more "dwelling-houses" within the meaning of the Act in the same building. "Dwelling-house" is not defined by the Act, and I think any reasonable interpretation of it which will give effect to the expressed intention of the Act may be properly adopted. I am, therefore, of opinion that the provisions of the Act, 11 & 12 Vict. c. 47, relating to notices to relieving officers were applicable to this inhabited room used as a dwelling, held separately in a dwelling-house, situate in a town, and that the answer to each of the questions reserved by the special case ought to be in the affirmative.

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JOHNSON, J :—

Counsel for the appellant contend that the Act 11 & 12 Vict. c. 47 does not apply to a dwelling-house in a town; nor in any event to a separate tenement, a room in a dwelling-house. In 1847 the 10 Vict. c. 31, reciting that the previous Act of 1838, and its amending Acts, had not been found sufficient for the due relief of the destitute poor, and that it was expedient to make further provision in that behalf, empowered the Guardians of the poor to give outdoor relief to specified classes of destitute poor persons. But these provisions were insufficient to cope with the national calamity of famine and famine-fever with which Ireland was smitten in 1847, exacerbated as that calamity was by ruthless evictions of the poor from their dwellings. In the desperate emergency of this national disaster Parliament passed the Act 11 & 12 Vict. c. 47, on which the present controversy has arisen. In order to ascertain the true construction of that Act and the mischief which it was intended by Parliament to meet, we must, I think, apply the rule for the construction of statutes laid down by the Judges in England, and expressed by Tindal, C.J., in delivering the opinion of the Judges to the House of Lords in the *Sussex Peerage Case* (1):

> "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (2), is 'a key to open the minds of the makers of the Act, and the mischief which they intended to redress.'"

The preamble of the 11 & 12 Vict. c. 47 is, "it is expedient to regulate the time of executing process for taking possession of land,

(1) 11 Cl. & Fin. 143.

(2) *Stowell* v. *Lord Zouch* (Plowden, 369).

and to provide for the better relief of the destitute poor evicted from their dwellings in Ireland."

These words are absolutely general, and, accordingly, sect. 1, dealing with "land" in its most comprehensive sense, including, as Blackstone says, not only the face of the earth but everything under it or over it, prohibits the execution of process for taking possession of *land in Ireland* on Christmas Day or Good Friday, or within specified hours at any other time. Sect. 2 enacts that not less than forty-eight hours before "taking possession of land on which there shall be any inhabited dwelling-house, or building used as dwelling-house," notice *shall* be given to the "relieving officer." This notice is to set forth "the *parish* or *barony*, electoral division and townland in which the land of which possession is to be taken is situate." No form of notice is prescribed, but the words "parish or barony, electoral division and townland" include land in the whole of Ireland—rural, city, town, or village—where any building of any kind or description used as a dwelling-house exists. Sect. 3 enacts how the required notice shall be given. Sect. 4 authorizes any person "who shall become destitute by reason of eviction from the building so used as a dwelling-house" to apply to the relieving officer, who, on receipt of such application, shall provide shelter, food, and medical relief for such destitute poor person. Sect. 6 imposes the penalty for default of service of the required notice; and it is under the provisions of this section the decree appealed from was given; and section 7 makes it a misdemeanour on the part of any person whomsoever who, with intent to dispossess "any person actually dwelling in a house or other building used as a dwelling-house," shall wholly or partially demolish or destroy same while he or any of his family shall be actually within same, except to give access to the sheriff. In these general statutable enactments I find nothing to prevent the terms "a dwelling-house or building used as a dwelling-house" from applying to "a dwelling-house in a town." On the contrary, I think those words are applicable to the whole of Ireland, including towns, cities, and villages, as well as rural districts and agricultural holdings. Then it is contended that the statute does not apply to a separate tenement—a room in a dwelling-house. An inhabited dwelling-house, or building

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used as a dwelling-house, may be let in separate and distinct parts or parcels—such as is commonly known as a tenement house. Each part from basement to attic is part of the building and may be actually occupied as a separate holding, from which the occupier may be duly dispossessed by process of law and thereby become destitute poor—that is, in fact, the present case. A landlord with intent to dispossess his tenant might shatter the windows, remove the doors or roof (if an attic) so as to make the dwelling uninhabitable, and thereby commit a misdemeanour. I think the Act applies to a separate tenement, even a room, used as a dwelling-house. This construction *ex visceribus actûs*, as Lord Coke says (Co. Litt., 381b), is, I think, the true interpretation of the Act, to be collected from its whole scope and object as expressed by the Legislature by which it was passed, providing a remedy adequate for the mischief it was intended to redress, and I agree in the judgment of the Court pronounced by the Lord Chief Baron.

KENNY, J. :—

I concur. The preamble of the Act indicates its objects. The latter are stated to be the regulation of the time of executing process for taking possession of land, and the making of provision for the better relief of the destitute poor evicted from their dwellings in Ireland. No more general language could be used for the purpose of showing that a distinction was not intended to be drawn between two sections of the destitute poor—those in towns and those outside of towns. Starting with this plain statement of the objects of this Act I cannot think that the language of the 2nd section, the construction of which we have to determine, conflicts in any way with it. The first section dealt with the regulation of the time of executing process. The 2nd and following sections deal with the second object in the preamble, namely, the provision for the better relief of the destitute poor evicted from their dwellings, and do so by reference to the eviction of "land on which there shall be any inhabited dwelling-house or building used as a dwelling-house." If the Legislature, having already stated its object in very general language, contemplated a restric-

tion on that generality, one would expect that if that restriction were to take the form of excluding dwelling-houses in towns, apt words would have been used to indicate the class of town, measured by locality, size, population, &c., intended to be excluded. But no such words are employed; and if the defendant's argument were good, we should be left to determine what description of town was excluded—whether villages were outside the section, and whether the Act extended only to purely agricultural or pastoral holdings, with dwelling-houses on them. In such speculations I would not know where to draw the line. It seems to me that the Act is reasonably plain, and does not admit of the restriction contended for by the defendant. I am further of opinion that the 8th section, which applies the Act to all estates and possessions of the Crown—without any qualification whatever—throws considerable light on the object and construction of the statute.

On the second question that has been argued I think there can be no doubt that the room which has been evicted is either an inhabited dwelling-house, or a building used as a dwelling-house; and, for the reasons given by my Lord Chief Baron, I am of opinion that it comes within the 2nd section.

Solicitor for the plaintiff: *P. J. Meehan.*
Solicitor for the defendant: *Bridge & Rolleston.*

J. L.

H. L. 1908.

Mar. 26, 27.

GALLAHER, APPELLANT; CLYDESDALE SHIPOWNERS CO., LIMITED, RESPONDENTS.

Ship—Discharge—Custom of port—"Whipping" or "hoisting."

APPEAL by the defendant Gallaher from the judgment of the Court of Appeal, affirming that of the King's Bench Division, [1907] 2 I. R. 578, 602.

Ronan, K.C., Gordon, K.C., and *Hanna*, for the appellant.

Right Hon. J. H. Campbell, K.C., A. J. Hamilton, K.C. (of the English Bar), and *John M'Gonigal*, for the respondents.

March 27.

The House of Lords (LORD LOREBURN, C., and LORDS ASHBOURNE, MACNAGHTEN, ROBERTSON, ATKINSON, and COLLINS) dismissed the appeal with costs (1).

Solicitor for the plaintiffs: *Martin J. Burke.*
Solicitors for the defendant: *Carson & M'Dowell.*

(1) *Ex relatione* Mr. M'Gonigal.

FITZSIMONS *v.* DUNCAN AND KEMP & CO., LTD. (1).

(1907. No. 4594.)

K. B. Div. 1908.

Jan. 29-31. Feb. 5.

Appeal.

May 14, 15. June 9.

Libel—Privilege—Malice—Evidence of—Principal and agent—Malice of agent, how far affecting principal—Publication—Inquiry agents—Credit of tradesmen—Company furnishing reports as to credit for reward—Condensation of report received from agent.

The defendants, K. & Co., were an incorporated Company, carrying on the business of mercantile inquiry agents, and having their head offices in London. For the purposes of their business they divided the United Kingdom into districts, having a manager and a number of local correspondents in each district. Clients of K. & Co. requiring information filled up printed inquiry forms (supplied by K. & Co.) regarding the solvency and commercial standing of the person about whom information was sought, and the inquiry was answered in strict confidence by K. & Co., after obtaining a report from their local correspondent in the locality where such person carried on business. K. & Co. were paid at a fixed rate for each inquiry, and paid a fixed proportion of each fee so received by them to the correspondent to whom they applied for information. This was the sole remuneration which they gave to their local correspondents. The local manager for K. & Co. at Belfast was A., and their local correspondent at Dromore, in the "district" of Belfast, was D. In response to an inquiry about the plaintiff by a client of K. & Co., A. applied to D., who made an unfavourable report. A. condensed D.'s report and forwarded it to the client. In an action against D. and K. & Co., jointly and severally, for libel, the libel pleaded being the report as condensed by A., and sent by him to the client, the jury found—(1) that the document was libellous; (2) that it was published by K. & Co., and by D.; (3) that there was malice by K. & Co. on the part of D., but not on the part of A.; (4) that there was malice by D.

Upon a motion for a new trial:—

Held, in the King's Bench Division—(1) that the occasion was privileged; (2) (Boyd, J., *dub.*) that K. & Co. were liable for the malice of their local correspondent D.; (3) (Johnson, J., *diss.*) that there was no evidence of publication by D.

Held by the Court of Appeal, that the plaintiff was entitled to judgment against both K. & Co. and D.

Pearson v. *Corporation of Dublin* ([1907] 2 I. R. 537; [1907] A. C. 351) discussed and applied.

(1) In the King's Bench Division, before PALLES, C.B., and JOHNSON and BOYD, JJ.

K. B. Div. 1908. FITZSIMONS *v.* DUNCAN AND KEMP & Co.

THIS ACTION, which was tried before Dodd, J., and a special jury, at Belfast, on the 17th December, 1907, was brought by James Fitzsimons against Kemp & Co., Limited, and David Duncan, jointly and severally, for libel.

At the date of the publication of the libel the plaintiff was carrying on business as a grocer and provision merchant at Dromore, County Down. The libel was published by Kemp & Co., a firm of mercantile inquiry agents, whose head office was in London, and was contained in a communication sent by them to Simmons, Hay, & Co., clients of theirs, who proposed to enter into dealings with the plaintiff.

Kemp & Co. conducted their business in the following manner:—They divided the United Kingdom into districts, having a central office with a manager in each district; and throughout every district they employed a number of local correspondents, to whom they applied for information concerning any person in the locality about whom they desired information for the purpose of supplying answers to questions sent to them by any of their clients. Any information so obtained was noted in a register, kept for that purpose in the central office of each district, which register was destroyed every fifth year. Kemp & Co. issued to their clients books of printed forms, in the shape of requisitions for a search on their register for any information contained therein concerning the person named in the requisition; they also issued to their clients books of printed inquiry forms at the rate of 1*s.* for each form. When a client desired information as to the credit or commercial standing and reputation of any person with whom he proposed to have dealings, he filled in a form by writing the name, trade, and address of the person to be inquired about, and the probable amount of credit to be given to such person, adding any special question or remark which he desired to make, and signing the form. The client then sent this form to Kemp & Co., who in turn forwarded it to their manager in the district within which the person named in the form resided. The district manager then sent a series of questions to his correspondent in the locality where the person about whom information was sought resided, or carried on business; and, from the answers or statements made by the

local correspondent, the district manager drew up a report which was sent to the client who had asked for it.

These books of "inquiry" and "search" forms were issued to subscribers to Kemp & Co., subject, *inter alia*, to the following printed conditions:—

1. "It is agreed that all information, printed, written, or verbal, is furnished in confidence for the use of the subscriber only, and is under no circumstances to be divulged by him to a third party, and the subscriber shall be held accountable for any loss or damage arising from the breach or non-observance of this agreement. All information received by the agency is understood to be so received in strict confidence, and the agency cannot, therefore, under any circumstances, divulge the source of any information it receives."

2. "Subscriptions are received, status inquiry-books, certificates, and search-books furnished, and information given upon the understanding that the agency is not to be held responsible for damages or loss arising from insufficient or inaccurate information furnished to the subscriber, whether by reason of mistake or negligence of the agency, or its servants, agents, or correspondents, or otherwise; and it is expressly agreed between the subscriber and the agency that no proceeding shall be instituted against the agency by reason of any information furnished or omitted to be furnished."

The foregoing conditions were incorporated in the receipts for inquiry-books and search-books; and each subscriber to whom such books were furnished was required to sign the receipt. Each inquiry form and request for a search contained a printed undertaking on the part of the subscriber, similar in terms to that in condition 2, *supra*. All answers and reports sent by Kemp & Co. to their clients had a printed heading, stating that the information must be regarded as "strictly private and confidential," and was furnished upon terms similar to those contained in condition 2, *supra*. At the date when the libel was published, the defendant Duncan was the local correspondent of Kemp & Co. at the town of Dromore, which was included in the district of Belfast, where Kemp & Co. had a central office, with one Avery as manager. In 1901, Duncan was appointed by Kemp & Co. their regular

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correspondent at Dromore, Kemp & Co. agreeing to pay him a fee of fourpence for each inquiry sent to him. The position of Duncan was described in an affidavit made by Avery in relation to this action as "their" (*i.e.* Kemp & Co's.) "agent in Dromore." Early in 1906, Duncan had furnished to Kemp & Co. a report on the standing and prospects of the plaintiff, the information being sought at the request of J. H. Lepper, a client of Kemp & Co., residing in Belfast. This report was as follows:—

"There is a James Fitzsimons in Meetinghouse Street, Dromore, who has commenced, or is about to commence, business there. He commenced life as a shop-assistant. He left that when his father died, who was a man fairly well off, and went into business with a Mr. A. Sherrard in the egg trade. Whatever money he had he invested it in the business; and, after some time, Sherrard finding his business not improving with him, owing as he alleged to Fitzsimons' dishonesty, the partnership was dissolved. Proceedings having been taken, Sherrard was obliged to pay him something to get rid of him. Subsequently he went into partnership with a Mr. Martin in the same business, trading as 'County Down Egg Company.' This only lasted nine months, and they went behind over £100, and Martin went to his farm in the country. Fitzsimons, since about a year, has done little or nothing. Martin alleged he deceived him; and I am told the creditors on the other side of the water have not been paid, and that proceedings are about to be taken; at what stage the partnership has arrived I cannot say.

"As to Fitzsimons himself, he is one of a family four of whom have been sent to Downpatrick Asylum, two of whom died there quite young, and he himself would seem to be tainted.

"One of his brothers died in the asylum six months ago, and his estate is in Court; this brother received something. There are some tenements in Meetinghouse Street, which it is said he receives rent from, although he is not the owner. He may have some money, but not much, as he had a wife and three children to keep, and has made nothing for years—since the time he left Sherrard.

"He has taken a house in Meetinghouse Street from Mr. M'Master at £20 a year, has van and horse, and is commencing

grocery and egg business on his own account. That business won't last long, as he is a most deceptive, sneaking fellow, who cannot be believed, and with no business capacity. If credit is given at present, I believe it will be perhaps right enough; but, as I have said, he will not succeed, and, considering the confused state of his family and father's estate, he requires to be carefully watched.

"I have given you as many facts as possible, and you can use your own judgment."

A report, based on the foregoing, was drawn up by Avery; and on February 14th, 1906, sent by him to J. H. Lepper, the client who had asked for it. Avery's report consisted of a summary of Duncan's statements, but did not contain the allegation that the plaintiff was tainted with insanity, nor was the phrase "a most deceptive, sneaking fellow" used.

Early in 1907, Messrs. Simmons, Hay, & Co., a firm of tea merchants in London, sent to Kemp & Co. a "request" for "registered information only" concerning the plaintiff; and received from them the following reply:—

"Search only. The information on our books bears date February, 1906, and is to the following effect:—This man's chances of success are very remote, and a careful watch should be kept over the account."

On February 7th, 1907, Simmons, Hay, & Co. sent to Kemp & Co. an "inquiry form," in which they stated the "probable amount of credit" as £30, and asked for an inquiry as regards the plaintiff's position, adding the following "remarks":—"We have a report that this man has considerable property in the town—his financial standing is good—is a first-class grocer. Please report again."

Avery thereupon sent a series of questions to Duncan relative to the plaintiff, which, with Duncan's answers thereto, took the following form:—

"Strictly private and confidential. *Very urgent.* Name.—James Fitzsimons. Trade.—Grocer. Address.—Meetinghouse Street, Dromore. Probable amount of trade credit.—£30. Has this man's affairs been settled in Court yet?—This man's affairs, or rather the affairs of his father, have been settled in Court long

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since; also a brother's, who died in Downpatrick Asylum. Has his trade increased?—Quite the contrary. *Is he the owner of house property?*—His sister has some house property in Meeting-house Street, of which she allows her brother to receive the rents. He is not doing well, and has little or no capital."

These questions by Avery, and answers by Duncan, were written upon a form, containing a number of printed questions which were left unanswered, and which apparently were not intended by Avery to be answered on that occasion.

With this additional information before him, Avery drew up the following report, which was, in the regular course of business, sent by Kemp & Co. to Simmons, Hay, & Co., and is the libel complained of in the action :—

"*Re* James Fitzsimons, Grocer, Meetinghouse Street, Dromore, Co. Down. £30. Correspondent reports :—This party has been a year established in business here, but only in a small way, and does little or no trade. He was originally a shop-assistant, and, after serving his time, he joined a man named Sherrard in the egg business, which was not a success. Subsequently the above went into partnership with a Mr. Martin in a similar business, and traded as 'The County Down Egg Co.' That only lasted six months, and some arrangement was made with their creditors. A sister of the above has some house property in Meetinghouse Street, the rent of which she allows her brother to receive, but he is doing little or no trade, and not doing well, and has no capital, and should be allowed no credit" (1).

This document was sent by Simmons, Hay, & Co. to a traveller in their employment, and ultimately came into the possession of plaintiff. The plaintiff then brought his action for libel against Kemp & Co. and Duncan, jointly and severally, pleading *in extenso* the above report sent by Kemp & Co. to Simmons, Hay, & Co. The other documents set out above were disclosed upon an

(1) This document, and also the others set out above, were written on the printed forms used by Kemp & Co. in the conduct of their business. The "inquiry" sent by Simmons, Hay, & Co. was taken from a book supplied to them by Kemp & Co. under the "conditions" printed *supra*, page 485, and the reports sent out by Avery had a printed heading similar in terms to "condition 2," *supra*.

order for discovery of documents, and were put in evidence at the trial of the action.

The defendants, Kemp & Co. and Duncan, appeared, and were represented separately at the trial; no plea of justification was put forward, but each of the defendants, in addition to the usual traverses, pleaded that the words complained of were written and published on a privileged occasion, without malice, and in the belief that they were true.

At the trial the plaintiff gave detailed evidence as to the matters alleged against him in Duncan's reports; and, from the statements made by him in relation thereto, as well as an account of a dispute which he had with Duncan relating to a policy of assurance, in which Duncan had acted as agent for the Insurance Co., which dispute took place before the reports were made by Duncan, it may be assumed for the purposes of this report that there was evidence of malice on the part of Duncan sufficient to be left to the jury.

Duncan was not called as a witness, and the only evidence of importance for the purpose of this report was given by Avery, who was called by the plaintiff in order to prove the publication of the libel. The publication of the libel was admitted by him when the original was produced. He also gave the following evidence:—

"I am manager of Kemp & Co., Belfast. My report to Lepper was based on Duncan's report to me. That was the sole information I had. I made no other inquiries. I rely on my local agents. The only information I had was in the books. Duncan was appointed our agent in January, 1901. He has nothing to do with the internal management of Kemp & Co. We pay him so much for answering inquiries. He had been answering queries satisfactorily. I believed Duncan was in a position to give me information. My experience led me to the conclusion that he gave me accurate information. I never heard of Fitzsimons till this. If any ill-feeling existed between him and Duncan, I never heard of it. I myself supervised the reply to Lepper. He was a subscriber. I honestly and *bona fide* believed the statement I made to him. I honestly condensed. I believed I was giving the substance of Duncan's information to me. I had

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no malice whatever. In 1907 I honestly believed what I wrote to Simmons, Hay, & Co. was a fair account. I never knew Duncan or saw him. His predecessor, as petty sessions clerk, had been an agent of ours. Acting upon the replies we got from Duncan, I framed the report to Simmons, Hay, & Co. The publication was limited to the one firm. Duncan had nothing to do with it. The report he sent me never left my office. I had no means of checking the honesty or accuracy of Duncan's reports. I adhere to the statement in my affidavit of May 21: 'He is our agent to answer inquiries.' Duncan is not acting for us now. We ceased to send him business from the commencement of this action. We have not dismissed him, but have not sent, and do not mean to send, him any more business."

Questioned as to the words "a deceptive, sneaking fellow" in Duncan's earlier report, the witness said: "I read the thing. I passed it. I thought the report went very far. It did not strike me at the time that it was going too far. From what I know now I do not believe it would be right to go as far as that."

To the Judge: "I was manager of Kemp & Co's. Belfast office. I was practically Kemp & Co. The whole of the matter was carried through by me."

The questions left to the jury, and their answers thereto, were as follows:—

1. Was the document a libel?—Yes.

2. Was it published (*a*) by Kemp & Co.?—Yes; (*b*) by Duncan?—Yes.

3. Was there malice by Kemp & Co.—(*a*) on the part of Avery?—No; (*b*) on the part of Duncan?—Yes.

4. Was there malice by Duncan?—Yes.

5. Damages?—£15.

The Judge gave judgment for the plaintiff for £15 with costs against both defendants.

Both defendants moved to set this judgment aside, and to have judgment entered for them, or for a new trial.

Gordon, K.C. (with him *R. F. Harrison, K.C.*, and *Tobias*), for the defendants, Kemp & Co. :—

The occasion on which the libel was published was privileged : *Waller* v. *Loch* (1). The only question, so far as Kemp & Co. are concerned, is this, can they be held liable for the malice of Duncan? The fact that their informant was malicious will not of itself make them liable : *Hennessy* v. *Wright* (2). That was a case in which a newspaper printed information sent to them by a correspondent ; and Lord Esher, M.R., in delivering judgment said :—"To shew that the persons who informed the defendant were malicious, does not put the case further . . . to shew that his informants were malicious, is not evidence that he was malicious." Thus, the publisher of a magazine was held not to be liable for the malice of the writer of an article which appeared in it : *Robertson* v. *Wylde* (3). The liability of Kemp & Co. therefore depends on the relation in which Duncan stood to them. In *Carmichael* v. *Waterford and Limerick Railway Co.* (4), a corporation was held not liable for malice on the part of its attorney ; but, even if that case is no longer law, we contend that the relationship between Duncan and Kemp & Co. was not such as will justify the finding of the jury. Duncan had no power to procure the publication of any report by Kemp & Co. : he was merely their informant, paid for answering questions sent to him ; but there was no continuous agency. Kemp & Co. might at any time have ceased to apply to him for information. Each report furnished by him and paid for by them was a separate and complete transaction. The scope of his employment was strictly limited to answering queries put to him by Kemp & Co. In *The Citizens' Life Assurance Co.* v. *Brown* (5) the agent whose malice was held to render his principals liable had very wide powers to act on their behalf.

Devitt (with him *T. J. Campbell*), for the defendant, Duncan :—

There is no evidence to connect Duncan with the publication

(1) 7 Q. B. D. 619.
(2) 24 Q. B. D. 445.
(3) 2 Moody & Robinson, 101.
(4) 13 Ir. L. R. 313.
(5) [1904] A. C. 423.

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of the libel. He had no power to procure its publication—that was the separate and independent act of Avery. Avery need not have used Duncan's reports at all if he had so desired. Avery's evidence shows that Duncan's reports might be altered, condensed, or paraphrased. In this case the sting of the libel, *i.e.* the statement that no credit should be given to the plaintiff, is not contained in any of Duncan's reports; but a libel must be proved as laid: *Parkes* v. *Prescott* (1). There is no evidence that Duncan requested or authorized the publication of the libel sued on; and a mere expectation of its publication will not render him liable: *Parkes* v. *Prescott* (1).

I submit that the evidence does not justify the finding of malice. Duncan's reports to Kemp & Co. were privileged, and he acted strictly within the scope of his employment. He made a full statement of all that he believed about the plaintiff, extenuating nothing; but he was bound to make a full statement of all that he knew or reasonably believed. His reports were not volunteered.

A. H. Bates, *K.C.*, and *D. M. Wilson*, *K.C.* (with them *Williamson*), for the plaintiff:—

There is ample evidence to support the finding of malice on the part of Duncan. There is the dispute between him and the plaintiff about a policy of insurance, which supplied a motive. Then there is, *e.g.*, the statement that Sherrard dissolved partnership with the plaintiff on account of the latter's dishonesty, and other statements which Duncan must have known to be untrue. Duncan can be made liable for the libel sued on. If the repetition of slanderous words is authorized, or if the words are intended to be repeated, or if the repetition is the natural consequence of their first utterance, the original speaker can be made responsible for their repetition: *Speight* v. *Gosnay* (2); *Parkes* v. *Prescott* (1). Duncan knew that his reports might be published, and he could have had no object in making statements injurious to the plaintiff unless he intended them to be published. From the nature of his employment he authorized Kemp & Co. to publish any statement made by him to them. If there is an intention that libellous

(1) L. R. 4 Ex. 169. (2) 55 J. P. 501; 60 L. J., Q. B. 232.

matter should be published, it is immaterial that the publication is the independent act of another: *Rapkins* v. *Hall* (1); and that the statement is not published in the words in which it was originally made; *Rapkins* v. *Hall* (1); *Parkes* v. *Prescott* (2); *R.* v. *Cooper* (3). The publication of this libel was the natural and probable consequence of a wrongful act on the part of Duncan, and therefore he is liable: *Clark* v. *Chambers* (4). The consequences are not too remote: *Sharp* v. *Powell* (5).

As to the liability of the defendants, Kemp & Co., a corporation can be made liable for malice on the part of its agents: *Citizens' Life Assurance Co.* v. *Brown* (6). *Carmichael* v. *Waterford and Limerick Railway Co.* (7) is no longer law. A principal is liable for the fraud of his agent acting within the scope of his business: *Barwick* v. *English Joint Stock Bank* (8); *Pearson & Son* v. *Dublin Corporation* (9). In this connexion no distinction can be drawn between fraud and malice. Duncan was "the agent" of Kemp & Co. for the purpose of supplying them with information to be used in the course of their business. That fact is established by the evidence of Avery. The libel was based solely on reports sent to Avery by Duncan. The question of agency never arose in *Hennessy* v. *Wright* (10), nor in *Robertson* v. *Wylde* (11).

The occasion on which this libel was published was not privileged. Kemp & Co. are merely volunteers. They deliberately, and for purposes of gain to themselves, undertook to supply information to their clients. They themselves created the duty, and they ought, in law, to be fixed with the responsibility. They are simply vendors of gossip; and, by the conditions of their contract with their clients, they endeavour to indemnify themselves at the expense of their clients, if communications made by them are divulged. If they can do this, they are in a position of complete irresponsibility, and may, with impunity, do serious injury to traders about whom they furnish reports. The doctrine of privilege

(1) 10 T. L. R. 466.
(2) L. R. 4 Ex. 169.
(3) 8 Q. B. 533.
(4) 3 Q. B. D. 327.
(5) L. R. 7 C. P. 253.
(6) [1904] A. C. 423.
(7) 13 Ir. L. R. 313.
(8) L. R. 2 Ex. 259.
(9) [1907] A. C. 351; [1907] 2 I. R. [537.
(10) 24 Q. B. D. 445.
(11) 2 Moody & Robinson, 101.

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rests upon the assumption that it is necessary for the benefit and protection of society; but, if pushed to the extent for which the defendants contend, it would be a danger to society, and not a safeguard.

R. F. Harrison, K.C., for the defendants, Kemp & Co., in reply:—

No case has been cited which decided that where libellous words were published on a privileged occasion, the person who published them lost his privilege because he drew his information from a tainted source. There was no permanent contract between Kemp & Co. and Duncan, and no obligation on the latter to answer queries put to him by Kemp & Co. Kemp & Co. had no cause to suspect Duncan of malice. Avery acted in good faith upon the information supplied to him. *Pearson* v. *Dublin Corporation* (1) is distinguishable from the present case. In that case there was evidence of recklessness amounting to fraud on the part of an agent expressly named in the contract with the plaintiff, and authorized to make representations on behalf of the defendants. See the judgment of Lord Atkinson at p. 367 of [1907] A. C., and at p. 552 of [1907] 2 I. R.

Feb. 5. PALLES, C.B.:—

There are two questions for decision here: First, whether there was evidence to go to the jury of the liability of Kemp & Co. for the libel complained of; secondly, was there evidence of the other defendant, Duncan, having published the libel?

The first question involves two separate matters: (*a*) whether the libel was published on a privileged occasion?; (*b*) if so, was there evidence that the publication of it by Kemp & Co. was malicious?

I entertain a clear opinion that the occasion was privileged. It is essential to the due carrying on of mercantile business that a wholesale trader, who contemplates selling on credit to a retail trader, should be entitled to make fair and reasonable inquiries as to the solvency of the latter; and if he has that right, so also must

(1) [1907] A. C. 351; [1907] 2 I. R. 537.

he be entitled to depute to another the duty of making those inquiries. Thus, the clients here, Messrs. Simmons, Hay, & Co., to whom the alleged libel was published, had an interest in the subject-matter of the communication, *i.e.* the result of the inquiries; and Kemp & Co., who had accepted their deputation, had become and were subjected to the duty of doing that without which such deputation would be of no avail, *viz.*, of making known to their principal the fair result of their honest inquiries. These considerations are sufficient to render the occasion upon which the alleged libel was published a privileged one.

It has been argued by Mr. Wilson that, however this might be in another case, it cannot be so in the present, where the defendants carry on the trade of supplying information about *all* persons as to whom their clients may think fit to make inquiries of them, and supply the information under terms which profess to guarantee them against loss for untrue statements which may seriously affect the mercantile position of traders; and so to guarantee them even when the untruth results from their own want of ordinary care.

The communications to which alone it is for the present necessary to hold that the privilege attaches are those which are *bona fide* made, in answer to inquiries, believed by Kemp & Co. to be honestly made by a particular client in reference to a person with whom the inquirer intends to deal, provided the result of the inquiries be satisfactory. I am not to be taken as holding that the communication to a client of a book, containing particulars as to the solvency of a number of persons, *with many of whom the inquirer had no intention of dealing*, is within the privilege. I entertain a strong opinion that it is not; and I mention the matter only because Mr. Harrison has suggested that, in a recent unreported case in the Court of Appeal in England, it was admitted by the counsel for the plaintiff that the privilege applied to this startling extent. The abandonment by counsel of a point does not amount to a decision of the Court; and for that reason I have not thought it necessary that this case should stand for inquiry as to the nature of the publication there complained of, especially as the extent of the class of cases to which the privilege applies does not arise here.

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Taking, however, the application of the privilege to be limited to the extent I have mentioned, I am unable to see why the inquiries cannot be deputed to another by one who can lawfully make them himself; and that that other cannot communicate the replies to him who authorized him to inquire; and while I by no means say that such a form of contract as that which has been adopted here might not, under particular circumstances, be material on the question of malice; and whilst I am not inclined to agree with Mr. Wilson as to the effective extent of the indemnity which such a contract provides for Kemp & Co.; I hold that our law as to contribution and indemnity between wrong-doers can effectively be used so as to prevent the relations between Kemp & Co. and their clients working any such danger to society as would prevent the existence of the privilege.

The next question is, was there evidence fit to be submitted to the jury of the existence of malice in the defendants? The argument is that there is not, because it is said that by reason of Kemp & Co. being a corporation the knowledge or fraud of Duncan cannot be imputed to them. I find great difficulty in thinking that that question is now arguable, or that it has been so since the year 1867, when the judgment of the Exchequer Chamber in England in *Barwick* v. *English Joint Stock Bank* (1) put an end to doubts which it had been thought by some had been introduced into the law of principal and agent by such cases as *Cornfoot* v. *Fowke* (2) and *Udell* v. *Atherton* (3). That judgment a few years after its delivery was approved of by Lord Selborne in the House of Lords in *Houldsworth* v. *The City of Glasgow Bank* (4), and it has lately been elaborately reviewed and adopted by that House in *Pearson* v. *Corporation of Dublin* (5). I might therefore dispose of this question of the liability of Kemp & Co. by simply quoting the following words of Willes, J., in delivering the judgment of the Court (6):—"With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other

(1) L. R. 2 Ex. 259.
(2) 6 M. & W. 358.
(3) 7 H. & N. 172.
(4) 5 A. C. 317. [537.
(5) [1907] A. C. 351; [1907] 2 I. R.
(6) L. R. 2 Ex. at p. 265.

wrong." If it cannot, neither can there be any sensible distinction between the case of libel and that of any other wrong.

The principle was stated in its widest terms in *Pearson* v. *Corporation of Dublin* (1). The words of the Lord Chancellor there are: "The principal and the agent are one; and it does not signify which of them made the incriminated statement, or which of them possessed the guilty knowledge."

To the same effect are those of Lord Halsbury (p. 357): "I do not understand the learned Judge to express any doubt as to the liability of the principals for the fraud of their agent, if there was fraud: *Cornfoot* v. *Fowke* (2). If it was supposed to decide that the principals and agent could be so divided in responsibility that—like the schoolboys' game of 'I did not take it; I have not got it'—the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence." And here let me say, as I am the Judge to whom the learned Lord in this statement refers, that he is entirely right in saying that I did not express any doubt (nor, I may add, did any of the Judges in Ireland) as to the liability of the principals for the fraud of their agent, acting within the scope of his employment. The only matter upon which my opinion was not identical with that of the House of Lords is not material to the question here.

Lord Halsbury says later on (p. 358):—"I desire to associate myself entirely with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge, or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who has the guilty knowledge."

This being the settled law, the position of Duncan is proved by the affidavit of Avery to be that of the defendants' "agent in Dromore to make the necessary inquiries." He is not a mere informant, as were the persons referred to in the interrogatories in *Hennessy* v. *Wright* (3) and *Parnell* v. *Walter* (4). The infor-

(1) [1907] A. C. at p. 354.
(2) 6 M. & W. 358.
(3) 59 L. T. 795.
(4) 24 Q. B. D. 441.

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mation obtained by him in answer to his "necessary inquiries" was in law the knowledge of Kemp & Co. There is evidence that the statement sent by Duncan to Avery, when compared with the actual facts as the jury from the evidence might have believed them to be, was so exaggerated or disproportionate as to be sufficient to lead them to the inference that Duncan did not really believe either the statement he sent forward to the defendants or that which they published to Simmons, Hay, & Co., and want of belief in Duncan, acting within the scope of his employment, is, upon the principle I have stated, want of belief in the company; and if we attribute, as we must, this want of belief to the company at the time they sent their statement to Simmons, Hay, & Co., there is evidence that they made the statement maliciously. The same principle may be applied in the following manner—Duncan's knowledge was the company's knowledge. With this knowledge, which was sufficient to show that they could not reasonably believe all the statements in their communication to Simmons, Hay, & Co. to be true, they published that communication; therefore they published it maliciously. In *Pearson* v. *Corporation of Dublin* (1) a statement, within the scope of his employment, sent by a servant of the Corporation of Dublin to his masters (with intent to be acted on, and which was acted on by them), and which was so sent under circumstances in which a jury might have held that it was made recklessly and without any real belief in its truth, was held evidence of fraud in the Corporation when they afterwards published that statement.

As to the second question, I am of opinion that there was no evidence that Duncan published the libel complained of. He published to Avery and to Kemp & Co. two other and different statements, neither of which has, or on this record could have, been found to be a libel. The question is, whether, by sending these documents to Avery, he made Avery or Kemp & Co. his agents to send another document—the libel sent on to Simmons, Hay, & Co.? Unless he did so, he did not cause, or procure, or request Avery to publish that libel. Whether he did or not depends on the terms of the documents and the circumstances under which

(1) [1907] A. C. 351; [1907] 2 I. R. 537.

they were sent. In libel you must declare upon the words; it is not sufficient to state the substance.

Now, I am of opinion that Avery was not Duncan's agent for any purpose whatever. The documents were sent by Duncan to Avery, because Avery was in a position in the defendants' service superior to that of Duncan, and with the view that they should be transmitted to Kemp & Co. as their own property, to be dealt with by them as they should think fit. Duncan had no authority to direct or request, nor did he direct or request, Avery to do anything. The documents, when received by Avery, were beyond the control of Duncan and under the full control of the defendants and of Avery. Between the receipt by Avery of the libel and its publication by him to Simmons, Hay, & Co., there intervened the free act of an intelligent being. The publication of the libel was emphatically Avery's own independent act, and as such the act of Kemp & Co., independent of Duncan; and was, to my mind, wholly distinct from the act of Duncan. I fully adopt the able argument on this part of the case addressed to us by Mr. Devitt.

But it is said that one must intend the reasonable consequences of one's own act; and that one of the reasonable consequences of the act of Duncan was the publication of the statements by Kemp & Co.; and that as that result actually took place, Duncan must be held to have intended that publication; and that because he intended it, as distinct from having requested it, the publication was his direct act from which an action for libel can be maintained against him.

No doubt every man must be held to intend the reasonable consequences of his acts, which actually ensue. But that doctrine, so far as it makes a person liable for the act of another, refers only to acts which would naturally ensue without the action of any intervening intelligent being. When there is such an intervention, the result is not, in contemplation of law, the direct consequence of the act. It is the consequence not alone of it, but of it and of the action of another intelligent being; and in such a case the result must be sued upon as a consequence flowing from the original wrongful act, not as the wrongful act itself. There was a vast amount of technicality in the

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old question, whether in a particular case the proper remedy was "trespass" or "case," as illustrated by the Squib Case (*Scott* v. *Shepherd* (1)); but there was one real principle of law wrapped up in it, viz., that there is a difference in law between a direct and a consequential act. If the plaintiff had applied for liberty to amend his statement of claim by stating Duncan's two communications to Avery, and that he published them intending that the substance of them should be transmitted to Kemp & Co., and by them to Simmons, Hay, & Co., then the communication to Simmons, Hay, & Co. might have been stated by way of special damage, resulting from the communication to Avery, and *that* cause of action would have been sustainable against Duncan. I asked why was not such an amendment asked for; and we were told by Mr. Wilson that such an amendment could not have been granted, as then the writ would have contained two separate claims, each being against a different defendant in respect of separate matters. He was probably right in that; and my own impression is that such an amendment could not have been allowed. But, however that may be, I must decide on the pleadings as they stand. Even if the difficulty pointed out did not exist, an amendment would now be impossible. It would involve a new trial, as other questions should be left to the jury, and separate damages should be assessed.

I do not think it necessary to refer to any of the cases cited upon this second question, with the exception of *Parkes* v. *Prescott* (2). All the cases of civil liability there cited are consistent with the principle I rely upon. In all of them there was evidence of request by the defendant to the tortfeasor to do the very act complained of: or evidence of agency, within the scope of which the wrongful act might be held to come, so as to make the publication sued upon the act of the defendant. In *Parkes* v. *Prescott* (2), too, there was evidence that each defendant had requested the publication. Each was present at a meeting of a board of guardians, which the reporters for the local press attended in the ordinary discharge of their duty. During the proceedings, in the course of a discussion as to the plaintiff's conduct, one of the defendants said he hoped the local press would take notice of the case, and

(1) 2 Blackstone, 892; 1 Sm. L. C. 454. (2) L. R. 4 Ex. 169.

requested his co-defendant (who acted as chairman) to give an outline of it. The co-defendant complied, and in the course of his statement said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it"; and the first defendant added, "and so do I." The libel complained of was a correct, but condensed, summary of the proceedings. It was there rightly held that there was evidence of a request by each of the defendants that a report of the proceedings should be published in the newspapers, and that, as the defendants could not reasonably have expected that the newspapers should report *verbatim* every word spoken, they had given implied authority to the newspapers to publish a summary of what had been said. But, being bound by and following and agreeing, as I do, in the judgment in that case, I cannot read the judgment of Mr. Justice Byles without recognizing that the principle on which he relied (which must be deemed to have been inapplicable there) must rule in a case such as the present in which there is no evidence of a request. "It is not," he says (p. 181), "sufficient at the common law that expressions equivalent to those set out in the declaration were written and published by the defendant; the libel must be proved as laid. It was at one time thought that the plaintiff need only prove the substance of the libel; but that doctrine was overruled in Lord Mansfield's time (see *Rex* v. *Berry* (1)); and it is now clear law that the words of a libel must be set out in the declaration, and must be proved as laid. A variance is fatal. It is true a variance is now amendable; but no amendment was here asked for or made, or could be made, so as to cure the objection that the evidence does not show what particular facts or what particular defamatory expressions were or were not authorized by the defendants." Then he refers to a case which was somewhat relied upon here: *Reg.* v. *Cooper* (2); and as to that he says: "But in that case it was shown that after the libellous article came out the defendant had seen it, and expressed his approbation of it." Then, after observing that it was a criminal case, he added what is undoubtedly true, "There is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly."

(1) 4 T. R. 217. (2) 8 Q. B. 533.

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I therefore hold that the cases cited do not apply, as there is not here, as there was in those cases, evidence of a request on the part of Duncan to publish.

Upon the whole, then, I am of opinion that the verdict against Kemp & Co. should stand, but that that against Duncan should be set aside, and that judgment should be entered accordingly.

JOHNSON, J.:—

This is an action for libel by Fitzsimons, a grocer and egg trader, in Dromore, County Down, against Kemp & Co., Limited, and Duncan, jointly and severally. The defendants have defended separately. Kemp & Co. are mercantile agents, whose head office is in London, and they have district offices or agencies throughout the United Kingdom, including one in Belfast of which Avery is their manager. Their business is to furnish confidential advice and information to their subscribers respecting the commercial stability of traders with whom, or to whom, their subscribers propose to open accounts or give credit; for this purpose they issue to their subscribers books of inquiry-forms; when the subscriber desires information about a trader with whom he proposes to deal, but of whose commercial standing, financial position, or business capacity he is ignorant, he fills up one of these inquiry-forms, which is value for 1*s.*, and sends it to Kemp & Co's. district office nearest to the person to be inquired about. In his affidavit Avery states this:—

> "Each of these district offices has regular correspondents in the surrounding towns and villages, to whom they apply for information regarding the party inquired about; and having got all the information they can from the various sources open to them they prepare a Report, and send it to the subscriber."

A business of this kind, if fairly and honestly conducted, is a great advantage to the mercantile community; by means of its extensive agencies or district offices it affords to the merchant the opportunity of acquiring business information about a trader with whom he proposes to deal, and which individually he would probably not otherwise have the means of acquiring or investigating. In February, 1907, Simmons & Co., wholesale tea mer-

chants in London, and regular subscribers to Kemp & Co., sent to Kemp & Co. an ordinary form of inquiry note regarding the financial position and commercial stability of the plaintiff, with whom Simmons & Co. proposed to do business. Kemp & Co.'s Belfast office (that is Avery, their manager there) instructed Duncan, "their agent in Dromore," to make the necessary inquiry. Avery in his evidence stated that Duncan was appointed *their agent in January*, 1901, and from the information supplied by Duncan, in reply to the inquiry Avery drew up the report which, as agent for Kemp & Co., he supplied to Simmons & Co., and which the jury have found to be a libel on Fitzsimons, the plaintiff. The jury have also found that this libel was published by Kemp & Co., and also by Duncan. As to Kemp & Co., I agree entirely with the Chief Baron's judgment, but as to Duncan different considerations arise. For Duncan it is contended that he is not answerable for this libel—that he neither wrote it, nor published it, nor requested or procured it to be written or published. If this was made out to the satisfaction of the jury, I should think that the verdict against him cannot be sustained. But even though a defendant may not himself have written or published the libel, or expressly required anyone else to do so, a jury may on the evidence lawfully before them infer the contrary; and, so long as the sense and substance of the defendant's communication by writing or conduct is preserved in the published libel, it is not necessary for the plaintiff, who complains of the defamation from which he suffers, to prove that the published libel is verbally and literally the identical communication which originated with the defendant (see Odgers, 4th edition, 161). This is I think a fair result of the decision in *Parkes* v. *Prescott and Ellis* (1). In that case at a meeting of a Board of Guardians Ellis *said* "he hoped the local press would take notice of this scandalous case," and requested Prescott, the chairman, to give an outline of it. Prescott *said*, "I am glad the gentlemen of the press are in the room, and I hope they will take notice of it." Ellis said, "So do I." The libel declared on, set out in two counts, published in the local paper, a correct but condensed summary of the proceeding. At

(1) L. R. 4 Ex. 169.

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the trial, Martin, B., directed a verdict for the defendants on the ground that there was no evidence of publication by the defendants of the libel complained of. The plaintiff's counsel excepted to this ruling on the ground "*that the libels which appeared were what the defendants meant should be published.*" Montague Smith, J., who delivered the judgment of the majority of the Court, says:—

> "I think the words must be of such a kind, and used in such a manner, as to satisfy the jury that they amounted to, and were in fact, a request to publish."

In that case the words of the defendants, translated into the newspaper publication of a condensed summary of the proceedings, were decided to amount to a publication by the defendants, although neither Prescott nor Ellis spoke or composed or wrote the defamatory matter in the condensed summary, or expressly requested its publication. The evidence proper to satisfy a fair jury of such implied request or procurement must vary with the special facts of each particular case. A written communication sent to the editor of a periodical, or a statement made to the reporter of a newspaper, *with the knowledge in either case that they will be sure to be published*, would be evidence from which a jury might infer from such conduct a request to publish it (*vide* Odgers on Libel and Slander, 4th edition, 161, and authorities there cited). In the present case Duncan had been the agent in Dromore of Kemp & Co. for five years; he knew the very nature of the business of Kemp & Co., and that Avery would be sure to send the information furnished to him by Duncan in reply to the inquiry, or a condensed summary of it, to whoever was inquiring about Fitzsimons, and that it was with that object that his information was acquired. I think therefore that the jury had evidence from which they might reasonably infer publication by Duncan. This jury was a special jury of Belfast, who ought to have the credit of being acquainted with commercial transactions, and who from the report of the learned Judge appear to have given the case a very careful consideration Then I think the occasion was privileged. In *Davies* v. *Snead* (1) cited with approval in *Waller* v. *Loch* (2), Blackburn, J., says:—

(1) L. R. 5 Q. B. 608. (2) 7 Q. B. D. 619.

> "Where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts; then if he *bona fide* and without malice does tell them, it is a privileged communication."

Here it was Duncan's business to answer the inquiry made to him by Kemp & Co., through Avery; and it was Avery's duty to communicate to Simmons & Co. the information so acquired by him. The occasion therefore was privileged: and this required the plaintiff to displace the privilege by evidence of malice in fact. This malice may be shown by any previous evidence of ill-will, and the jury had that evidence in Duncan's reports to Avery; and his malice is Kemp & Co's. malice: their relation was that of principal and agent, and in *Pearson* v. *Dublin Corporation* (1) Lord Halsbury says:—

> "I desire to associate myself entirely with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge, or which of them makes the incriminating statements. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who has the guilty knowledge."

Lord Westbury says (*Cullen* v. *Thomson's Trustees* (2)):—

> "All persons directly concerned in the commission of a fraud are to be treated as principals."

And Willes, J., in delivering the judgment of the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (3), says:—

> "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

The Citizens' Life Assurance Company v. *Brown* (4) is the latest authority with which I am acquainted on this subject, where it was held that though a servant may have no actual authority, express

(1) [1907] A. C. 351, at p. 358.
(2) 4 M'Queen, 424.
(3) L. R. 2 Ex. 259, 265.
(4) [1904] A. C. 423.

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or implied, to write and publish a libel which he knows to be untrue, yet if he does so in the course of his authorized employment, the Company is liable.

In the present case Duncan in the course of his authorized employment took advantage of the opportunity to gratify his personal malice: *Clark* v. *Molyneux* (1); yet between them the libel was published so as to inflict the wrong, and thereby damage was caused to the plaintiff, and each and every one concerned in the common transaction is liable to the plaintiff for the libel. Usually the action is brought against the most solvent person, but the act is nevertheless the act of each as well as of all—

> "Although the Commanders are trespassers, so are also the persons who did the fact" (*Sands* v. *Child*, 3rd Lev. 351).

For these reasons I am of opinion that the verdict should stand; but the majority of the Court are of opinion that it should be set aside as against Duncan.

BOYD, J.:—

I concur in the judgment of my Lord Chief Baron, though not without considerable hesitation.

The occasion upon which this libel was published was privileged; the defendants Kemp & Co. are, therefore, exempt, unless guilty of malice, and it is admitted that the publication of the libel was made by them in good faith. I have no doubt that, so far as Duncan is concerned, he cannot be made liable in this action. In the first place, he did not authorize the publication of the libel, and in the second place, he is not sued in respect of the report sent by him to Avery; nor can the report sent to Simmons, Hay, & Co. be relied on as a publication of his report. The two documents differ in many respects, notably in the fact that Duncan's report does not contain the statement that no credit should be given to the plaintiff, and that statement is really the sting of the libel. I quite admit that Duncan's report was reckless and malicious—I might almost call it a ribald report;

(1) 3 Q. B. D. 237, 247.

but then the libel written by him is not the libel relied on in the pleadings, and it is essentially different from that in the report sent by Avery to Kemp & Co., and by them to Simmons, Hay, & Co.

Duncan was the agent of Kemp & Co., merely for the purpose of obtaining information for them as to the financial position of persons in his district, when such was required by them. He was not a general agent. His reports were not furnished direct to Kemp & Co., but to Avery, and the latter, as in this instance, sent forward a report of his own.

If Kemp & Co. had published Duncan's report, I have no doubt that they would be liable in an action founded upon it; but I find it hard to see why Kemp & Co. should be liable for the malice of Duncan, when the malicious document of Duncan was not published by them, and, in fact, never reached their hands, for Duncan's report never got beyond Avery. I think that *Pearson* v. *The Dublin Corporation* (1) is somewhat different from the present case. In that case the document relied on was sent forward by the defendants in the same form as they received it from their authorized agents; but in this case Duncan's report was not published by Kemp & Co., and what was published by them is quite different from Duncan's report. That is my difficulty. The jury has found that Kemp & Co. were not guilty of malice through Avery; and as it was Avery's report, not Duncan's, which they published, it is only with the greatest difficulty that I can bring myself to hold them liable for malice exhibited in a report which they did not publish.

J. C. W.

The defendants Kemp & Co. appealed from the order of the King's Bench Division; and the plaintiff also appealed from the order so far as it set aside the verdict against the defendant Duncan (2).

(1) [1907] A. C. 351; [1907] 2 I. R. 537.

(2) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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Gordon, K.C., R. F. Harrison, K.C. (with them *Tobias*), for the defendants Kemp & Co.

T. J. Campbell (with him *Devitt*), for the defendant Duncan.

A. H. Bates, K.C., D. M. Wilson, K.C. (with them *Williamson*), for the plaintiff.

The arguments on the appeal were substantially the same as those addressed to the King's Bench Division, save that the case of *Macintosh* v. *Dun* (1), then before the Judicial Committee of the Privy Council, was mentioned by counsel for the plaintiff.

June 9.

FITZGIBBON, L.J.:—

This case was heard during the last Sittings. During the vacation we prepared a judgment, which we revised together on Tuesday last, and listed for this day. On Thursday the opinion of the Judicial Committee in *Macintosh* v. *Dun* (1), delivered by Lord Macnaghten, was published. It deals with the question of privilege in a similar case. In our case, the Judge at the trial, and the King's Bench, held the libel to have been published on a privileged occasion. In our judgment we had assumed this to be so, and our decision rests upon other grounds. Under these circumstances I now read the judgment as it was written, without considering whether the same conclusion would not follow from the negation of privilege by the Privy Council.

This action was brought by James Fitzsimons, a grocer of Dromore, against Kemp & Co. of London, whom I shall call "The Company," and David Duncan of Dromore, for an alleged libel upon the mercantile standing of the plaintiff, contained in a "Report" dated February 8th, 1907, sent "in strict confidence" by the manager of the Company's business in Belfast to a London firm, Simmons Hay & Co., which was afterwards shown to the plaintiff by a traveller of that firm.

The Company has "district offices" throughout the United Kingdom, including one at Belfast of which George Avery is the resident manager, and the Company's business consists in furnishing

(1) [1903] A. C. 390.

confidential information to "subscribers" regarding traders. The subscriber sends an inquiry-form, for which he pays, to the district office. Each office has regular "local correspondents," to whom the manager applies for information, for which he pays them; and, having got it, he prepares a report which he sends to the subscriber.

In February, 1907, Simmons Hay & Co., as subscribers, applied to the Company for information regarding the financial condition of the plaintiff, with whom they proposed to do business.

Accordingly, Avery sent a form to Duncan, whom he describes as the Company's "agent in Dromore," instructing him to make inquiries.

Duncan thereupon furnished certain information to Avery, on which he based the report which was sent to the subscribers, and upon which the action is brought.

Upon an affidavit alleging a cause of action within the jurisdiction against the Company and Duncan jointly, the plaintiff obtained liberty to serve the writ upon the Company out of the jurisdiction.

The statement of claim is based upon the publication of the Company's report only, and not upon Duncan's information, as a libel upon the plaintiff in his business. The first paragraph alleges a joint publication by both defendants. The second and third paragraphs contain alternative claims against the defendants severally for publication of the words complained of in paragraph 1. The only publication proved is that to Simmons Hay & Co.

The case was tried by a special jury before Dodd, J., at the Winter Assizes, 1907.

It appeared in evidence that Avery had obtained two reports from Duncan about the plaintiff. The first was in answer to an inquiry by a Belfast subscriber named Lepper, and was dated February 13, 1906. The second was dated February 7, 1907, and was sent in reply to a special inquiry on behalf of Simmons Hay & Co.

Avery produced both these reports. He said that he made no other inquiries—he relies on his local agents—Duncan is paid so much for answering individual inquiries, but has nothing to do with the internal management of the Company.

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Avery *bona fide* believed, he honestly condensed, and he believed that he was giving the substance of Duncan's information in the report which he wrote and sent to the subscribers, and the publication was limited to the one firm. Duncan had nothing to do with it, and Avery had no means of checking the honesty or accuracy of Duncan's reports.

Duncan was the Company's "agent to answer inquiries." He got 4*d.* for the answer to the inquiry in this case; Avery was practically Kemp & Co. in Belfast, and the whole of the matter was carried through by him.

Duncan's replies, especially the first, were so worded as to supply some evidence of personal feeling against the plaintiff; there had been litigation between them, and the alleged libel was disparaging of the plaintiff as a trader. Several of the statements were contradicted or qualified by the plaintiff in his evidence, and, as against Duncan, the question of malice could not be withheld from the jury. The only material plea was that of privileged communication. Justification was not pleaded by either defendant.

At the trial the counsel for the Company asked for a direction on the grounds—

1. That the occasion was privileged.
2. That there was no evidence of malice as against the Company.
3. That evidence of malice on the part of Duncan, if there were any, was not evidence on a plea of privilege against the Company.

Counsel for Duncan asked for a direction on the grounds:—

1. That there was no evidence of publication by him of the libel sued on, *i.e.* Avery's Report.
2. That it was a privileged occasion.
3. That there was no evidence of malice.

The learned Judge ruled that the occasion was privileged; but he said that he would leave the question of malice to the jury. He also indicated his intention of directing a verdict for Duncan on the publication, and of directing that the Company was not responsible for Duncan's malice, if any; but he said that he would put the questions to the jury with such directions as would enable

any party to have the matters at issue finally decided without a new trial.

There was a long discussion between the Judge and counsel, and an elaborate charge, and the jury came out to ask a further question to which I must hereafter refer, but ultimately the following questions were put and answered—

1. Was the document a libel?—Yes.
2. Was it published—(*a*) By Kemp & Co.? (*b*) By Duncan?—Yes.
3. Was there malice by Kemp & Co.—(*a*) on the part of Avery?—No. (*b*) on the part of Duncan?—Yes.
4. Was there malice by Duncan?—Yes.
5. Damages?—£15.

The judge gave judgment for the plaintiff with costs against both defendants. He did not direct in accordance with his previous intimation, because it occurred to him, while the jury were so carefully considering their answers, that it would not be proper or decorous, after having left questions to the jury, to decline to act upon their answers.

But he stayed execution—and both defendants moved to set aside the judgment for the plaintiff and to have judgment entered for them, or for a new trial.

In the King's Bench two questions were considered; (1st), Whether there was evidence to go to the jury of the liability of the Company for the libel complained of? In substance, this means whether the occasion of Avery's publication to Simmons Hay & Co. was privileged; and, if so, whether Duncan's malice in contributing to that publication deprived the Company of its privilege; and (2nd), whether there was any evidence of the defendant Duncan having published the libel sued upon, *i.e.* Avery's report?

The case was heard by the Chief Baron and Johnson and Boyd, JJ. The Court was unanimous in holding the occasion privileged, and, Boyd, J., *dubitante*, in holding the Company liable for Avery's report as being in law malicious on the part of the Company, being founded upon Duncan's information, which was found to be in fact malicious. The Chief Baron and Boyd, J., held that there was no evidence of publication of Avery's report

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by Duncan, and entered judgment for him accordingly. Johnson, J., held that the jury might infer a request by Duncan to publish the libel from his knowledge that it was to be published, and he upheld the verdict and judgment against both defendants. From this order the Company and the plaintiff have both appealed, the Company seeking judgment for them, and the plaintiff seeking the restitution of the judgment against Duncan. We are of opinion that there is sufficient evidence to sustain the verdict of the jury, and accordingly we agree with Johnson, J., that the plaintiff is entitled on the findings to judgment against both defendants.

On this action Duncan's reports must be regarded only as *materials for the libel sued upon.* The Company could not have been sued upon them, for Avery's report was the only document which the Company published; and it was the only document sued upon. Furthermore, as we understand the Irish rules and orders, the Company could not have been served with the writ in this action, if Duncan had not been sued as a joint tort-feasor with them on Avery's report; and on the pleadings and proofs as the action stands, judgment could not be recovered by the plaintiff against the Company only, when judgment was given for the defendant Duncan, whose being a joint tort-feasor was the foundation of the order for service out of the jurisdiction upon the Company.

We do not decide this point, however, as, though pressed here by Mr. Harrison, it was not mentioned in the judgments below.

We agree with the Chief Baron in his statement and application of the principle on which the King's Bench has held the Company answerable for the libel, because the defamatory matter was based upon information which was maliciously given by Duncan as a servant of the Company, in the course of his employment, for the purpose of being published by the Company to its subscribers, and was so published by the Company in the course of its business, and for reward.

But we cannot accept the Chief Baron's view of the relations between the Company and the two *employés* who took part in the production of the libel—Avery, the "Belfast Manager," and Duncan, the "Dromore Correspondent." Duncan's knowledge—

patent on the documents—of the purpose for which the information was asked, and of the intention to publish the purport of it to the Company's subscribers, in the course of the business for which the subscribers paid the Company (and the Company in turn paid both Avery and Duncan in their several departments), was in our opinion ample evidence of Duncan's authority so to publish the defamatory matter which Avery took from Duncan's information.

We have to deal with a *business* of procuring and publishing information, carried on for profit by a corporation which can do its business only by individual servants. In such cases, long before *Pearson's Case* (1), it was settled that the corporate employer who takes the profit must answer for the wrong or default of the servant who does the work. Negligence, fraud, and malice, are all on the same footing in this respect, so long as what the servant does is within the scope of his employment, and of the employer's business, and the wrong is not some personal act of the individual, outside that business.

If the libel here conveys the purport of Duncan's information, and is defamatory, his malice is fatal to the Company's privilege. Holding the Company responsible for Duncan's malice, privilege is, therefore, out of the case.

It has been held at the trial and in the King's Bench, that the Company, in doing the whole business, and that Avery and Duncan each in doing his own part of it, was acting on a "privileged occasion." We assume this to be so, and we do not desire to anticipate limitations of "privilege" attaching to the proper conduct of any lawful business. But we reserve our judgment upon the question whether the business of supplying information affecting personal character or mercantile status is privileged on the ground of utility. It took the Newspaper Libel Act to privilege reports of matters of public interest. "Stubbs Gazette" has been defended as being merely a useful means of making accessible records which are already public. Speaking for myself, I do not wish prematurely to affirm that defamatory matter, disparaging the character or credit of individuals, is published on a privileged

(1) [1907] A. C. 351; [1907] 2 I. R. 537.

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occasion, merely because it may be *useful* that information upon hearsay should be obtainable from people who make a trade of collecting it for reward.

The conditions appearing upon the Company's forms in this case suggest a consciousness of "playing with edged tools," and of the risk of liability if what is confidentially circulated should leak out and should prove to be libellous. I reserve my judgment whether liability does not exist when justification can not be proved.

We regard the Company as having contracted to supply their subscribers with information as to the plaintiff's solvency. They employed two people to obtain and supply it for them. Avery did their business in Belfast, and Duncan answered their inquiries in Dromore. Duncan, on Avery's requisition, furnished certain information which was libellous; and Avery published the libel, honestly believing what he wrote to be "the substance of Duncan's information."

In our view the case is the same as any other in which a principal contracts to make or prepare and supply an article for a customer, and employs more than one servant to do the work. If one assistant prepares or weighs out drugs, and another compounds them; or if one set of workmen are employed to prepare materials, or to construct the parts of a machine, and others to put them together, the employer's liability for defective work is the same whether it has arisen from the fault of one servant or the other. Duncan's part in this transaction was procuring the information which Avery supplied to the subscriber. There was no "deputation" by the person who wanted the information. He employed the Company to give it. The Company employed Duncan to supply it, and Avery to edit and publish it. In the course of that employment, in place of giving the "fair result of honest inquiries," Duncan gave defamatory information, which even Avery said "went very far—farther than he believed it would be right to go" from what he knew at the time of the trial, and which the jury has found to be malicious and untrue. Duncan's reports were the "basis" of what Avery, in the course of his duty, published; and, on the authorities cited below, from

Barwick's Case (1) to the *Citizens' Life Assurance Case* (2), we hold that the publication was deprived of "privilege" by the malice of Duncan, who supplied the information which Avery innocently published, each acting in the course of the Company's employment.

It remains to consider whether Duncan authorized this publication. On the authority of *Parkes* v. *Prescott* (3) we hold, without doubt, that there was ample evidence against Duncan of authority to publish to the Company's subscribers the purport of the information which he supplied.

The form of "inquiry" sent to Duncan, both on February 13, 1906, and on February 7, 1907, is in evidence. It is in each case the front leaf of his report. We think that it must have escaped the attention of the Court below. The Chief Baron does not refer to it; and we cannot reconcile his judgment with knowledge of its terms. It begins—

> "We shall be much obliged if you will favour us with information and advice as to the person named on the other side in strict confidence."

It concludes—

> "The information we give our subscribers is for ordinary business purposes only, and the inquiry does not convey any imputation. *The purport of your reply will be communicated to our subscribers only who give us an undertaking to receive same in strict confidence.*"

We regard sending information in reply to an inquiry in this form, and for reward, not merely as clear authority to publish, not the *ipsissima verba*, but the "purport" of the reply, but as an acceptance of responsibility for the publication when made for the purpose for which the information has been required.

Furthermore, the terms of the document indicate that both the Company and their informant may have to rely upon the customer's obligation of "strict confidence" as their protection against liability. The transaction, when carried out, makes the document which states the purport of the reply the joint product of the operations of Avery and of Duncan in the performance of the business of the Company, and makes the Company and

(1) L. R. 2 Ex. 259. (2) [1904] A. C. 423. (3) L. R. 4 Ex. 169.

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Duncan both responsible for the defamation which he uttered, and which Avery published.

The question whether the libel conveyed the "purport" of Duncan's reply is one of fact; but it puts the Company into a dilemma. If Avery had written defamatory matter which Duncan had not purported to give to him, he must have been guilty of some neglect or misconduct for which the Company should answer. The jury has found that Avery acted throughout in good faith, and this implies that his report conveys his honest understanding of Duncan's information. This is borne out by the documents. The sting of the libel is in the imputation against the plaintiff of having been first engaged in a business "which was not a success," and afterwards in another "that only lasted six months, and in which some arrangement was made with creditors." Lastly, that he was "doing little or no trade, and not doing well, and has no capital, and should be allowed no credit." It is not quite clear, but, from internal evidence in the report of 1907, it seems probable that his previous report of 1906 was sent to Duncan, or was in his hands, when he answered the inquiry of 1907; but in any case it must have been present to his mind, as the second report refers to previous information. The Company, at any rate, paid him for each report: each was on the form which I have read, and, therefore, the Company was entitled to use both when reporting to subscribers. The report of 1906 gives disparaging details, mentions family troubles, and describes the plaintiff as one whose "business wont last long, as he is a most deceptive, sneaking fellow who cannot be believed, and with no business capacity," and who "requires to be carefully watched." It refers to "proceedings about to be taken" by unpaid creditors, and also to the confused state of his family and father's estate, and concludes—

> "I have given you as many facts as possible, and you can use your own judgment."

The first question on the inquiry-form in 1907 is, "Has this man's affairs been settled in Court yet?" The answer is, "This man's affairs, or rather the affairs of his father, have been settled in Court long since, also a brother's who died in Downpatrick

Asylum." This plainly refers to matters mentioned in 1906. The next question is, "Has his trade increased?" This must mean "since your last report." The reply is "Quite the contrary." It concludes "he is not doing well, and has little or no capital."

That the libel, which was Avery's statement of what he honestly believed to be "the purport of Duncan's replies," was not an over-statement of their defamatory character, but—to quote Duncan himself—"quite the contrary," is not only implied in the findings of the jury, but is patent on the face of the documents.

The jury seems to have been remarkably intelligent, business like, and *tenax propositi*, even against the opinion of the Judge, as one might expect in Belfast.

Considering the elaborate instructions which they received, and the discussions with counsel which they heard, the written question which the jury put, when they came out to ask for further guidance, seems to us to go to the very point of the case as to Duncan's liability for Avery's publication—

> "A. published a report based upon information supplied by B. Although the actual report does not embody or contain the whole of the information furnished by B., can B. be considered as publishing it, he well knowing the information was furnished for the purpose of publication?"

The Judge said, "To answer a hypothetical question would probably be misleading." But, reading Avery for A., and Duncan for B., this question was not hypothetical. He had told the jury, handing the particular document to the foreman, that it was not enough if Duncan supplied materials or wrote defamatory words about the plaintiff to Avery; that they must be satisfied that Duncan was a party to the publication of *that particular document*, requested or procured *it* to be written, and it was hard to answer their way of putting the case. They then asked, orally, "If they were satisfied that Duncan was a party to the publication as he had defined it, would it still be a publication, notwithstanding that the document in their foreman's hands did not embody or contain all that Duncan had supplied?" To this the Judge reports that he replied—

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"If they were satisfied otherwise, *on a review of all the facts*, that Duncan procured the particular document before them to be published, it would not cease to be a publication merely because it did not contain all that he supplied. But they must be satisfied he was a party *to the publication of the particular document*."

Counsel for the Company did not object to this direction. Counsel for Duncan called on the Judge to tell the jury, in accordance with his previous intimation of his view, that there was no evidence of Duncan being a party to the publication. He said that in leaving it to the jury he must leave it fully; and he reports that the jury evidently gave the matter great consideration, and finally found that there was a publication by Duncan.

In our opinion this finding was perfectly right. No other verdict would be consistent with the terms on which Duncan had supplied the information to the Company; and if the Judge erred in his view or instructions, he did so only by presenting the case too favourably for the defendants.

We are also satisfied from the report that, upon the explanation given them on what the Judge calls the question of Duncan's being "guilty of malice *binding the Company*," the jury considered the question whether Duncan's malicious act was one done within the scope of his employment.

This question might have been left in the definite form of the two special questions which Mr. Wilson submitted; but, as the Judge told the jury that they must be satisfied that Duncan was not only malicious, but that he was malicious under such circumstances as to affect the Company with his malice, reading their affirmative finding with the instructions given, we agree with the King's Bench that there is ample evidence to sustain the finding on Duncan's malice, and that on this point also the charge erred, if at all, in favour of the defendants.

In one respect, pressed by Duncan's counsel as entitling him to a new trial, the course of the trial was peculiar. Duncan was not called. *At the close of the plaintiff's case*, the Judge had intimated that he was against the plaintiff "on there being a publication by Duncan," and that "to make the Company

responsible for Duncan's publication he thought there must be evidence that Duncan had authority from the Company to publish." The defendants *then* in turn elected not to go into evidence. *Afterwards*, when the Judge declined to put Mr. Wilson's special questions, he said that he would, as then advised, direct a verdict for Duncan on the publication, also that he would direct that the Company were not responsible for Duncan's malice, if any; but that he would put the questions he had framed to the jury, with such directions as would enable any party to have the matters at issue finally decided without a new trial. *After all this*, counsel addressed the jury, the defendants not going into evidence. In his charge the Judge for the third time repeated his views that there was no evidence of publication against Duncan, and no evidence that Duncan was in a position of authority so as to bind the Company by his malice. But, in submitting these questions, he told the jury that he wanted their own opinion, uninfluenced by anything they had heard as to his opinion.

Throughout the trial, and up to and after the verdict, no desire on the part of Duncan to go into evidence was indicated. It is easy to imagine prudential reasons against producing him. Throughout the trial the jury appears to us to have appreciated the questions of fact which they had to try, and to have estimated the evidence upon those questions, and to have answered them consistently and clearly; and, though their findings were contrary to the opinion of the Judge, they appear to us to be supported by the evidence. Duncan, having taken his chance that the view of the Judge would prevail, and having elected not to give evidence, can not now demand a new trial.

On the issues as against Duncan the principal points on which, with all respect, we are unable to agree with the Chief Baron are the following:—

1. That what Duncan published to Avery was "another and different statement" from that which has been found to be a libel.

We think the libel fairly states the "purport" of Duncan's replies.

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2. That he did not cause or procure or request Avery to publish the libel.

The Chief Baron held that whether he did so or not depended on the terms of the document, and was a matter for the Court and not for the jury. We think that it depended on Duncan's knowledge that the purport of his replies was to be published to the subscribers, and on the terms in which he was informed of the use which was to be made of the information which he gave.

3. That Duncan did not direct or request Avery to do anything; that the publication of the libel was Avery's own independent act, wholly distinct from the act of Duncan.

We think that the libel was the joint product of the successive acts of Avery and Duncan, and that Avery's publication of the purport of Duncan's replies was the direct consequence of Duncan's giving the defamatory information which Avery used in the fulfilment of the very purpose for which Duncan was paid to supply it.

4. Lastly, the Chief Baron says that the doctrine of responsibility which makes one person liable for the act of another refers only to acts which would naturally ensue "*without the action of any conscious intervening intelligence*," and that in this case the publication was "emphatically Avery's own independent act."

We think that the publication of this libel was the result of the action of the "conscious intelligence" of both Avery and Duncan, each acting in co-operation with the other, one supplying the information and the other publishing the purport of it, each being liable for his own acts, and the Company being liable for both.

The appeal of the Company must be dismissed with costs against them, and the appeal of the plaintiff must be allowed with costs against Duncan; the verdict must be upheld, and judgment with the costs of the action and of the motion in the King's Bench, must be entered against both the defendants. The costs in the King's Bench should be taxed with due regard to the statement in the order of the King's Bench that the two motions were heard as one, and the costs of the plaintiff's appeal given against Duncan should also be taxed with due

regard to the fact that the two appeals have been heard together. In addition to the costs which he will recover against the Company upon the appeal which has been dismissed, the plaintiff should recover against Duncan only such further or additional costs as were properly incurred by him in prosecuting his own appeal which has been allowed.

Solicitor for the plaintiff: *T. B. Wallace.*
Solicitors for the defendants Kemp & Co.: *Wheeler & M'Cutcheon.*
Solicitors for the defendant Duncan: *M'William & Wallace.*

R. ST. J. C.

CRAWFORD & FRAME *v.* VANCE (1).

(1907. No. 3588.)

Defamation—Libel—Slander—Innuendoes—Privilege—Fair comment—Findings of jury—Perverseness—Inconsistency—Trial—Practice.

The Corporation of Dublin, in contemplation of a drainage scheme for the Clontarf district, advertised for tenders for the work. The majority of the Corporation rejected the lowest tender and accepted the next lowest, sent in by the plaintiffs. They were mainly influenced in doing so by representations made by the plaintiffs, that the ironwork in connexion with the undertaking would be wholly done at a foundry in Dublin, for which they had started a joint-stock company. One member of the Corporation and a relative of another were shareholders in this company. It turned out, however, that a large portion of the ironwork could not be executed in this foundry, and should be manufactured in England. It may be furthermore taken as admitted for the purpose of this report that inferior pipes were sought to be substituted by the plaintiffs for those described in the specifications. The defendant, a member of the Dublin Corporation, (*a*) wrote a letter to the Local Government Board, which he published in the Press; (*b*) and (*c*), made speeches in the Council Chamber, and (*d*) wrote a letter to the Press, which, together, constituted the defamatory matter for which the present action was brought.

Letter (*a*) contained the following words, relied on in the statement of claim, paragraph 10:—"It is easy to understand how the Council was induced by a large majority to adopt this report," *i.e.*, that of the Improve-

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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ments Committee, "the result of which is to put a tax of £1250," *i.e.*, the difference between plaintiffs' and lowest tender, "on the already sorely burdened ratepayers. If the statement be correct, I do not see the possibility of any efforts, however strenuous, being successful in narrowing the way that leads to corruption. On the contrary, your action will have the effect of broadening it" (1).

In paragraph 11 an innuendo was put on these words, that they meant that the plaintiffs were guilty of corruption and dishonesty in endeavouring to procure the contract.

The speech (*b*), as partially stated in paragraph 4, after making a charge about the inferiority of the pipes, whereby the plaintiffs, it was alleged, would have made close on £2000, proceeded :—"It was not more than a month ago that the junior partner of that firm" (meaning the plaintiffs) "was charged with attempting to corrupt a member of that body by offering him a bribe of £50. . . . All knew how eloquently their" (the plaintiffs') "case was put forward by Alderman I., and they knew something about Alderman F.'s advocacy. Both gentlemen were pecuniarily interested. We are unfortunately connected with men" (the plaintiffs) "charged with deliberate corruption. It was a very hard thing to give a contract into the hands of a man who had made no attempt to clear himself of the charge. Another gentleman had been deliberately charged with taking this bribe, and that gentleman was sitting in the Council at the present time."

The innuendoes upon this were—(i) (paragraph 5) that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors; and (ii) (paragraph 6) that the plaintiffs had been guilty of a criminal offence, punishable by imprisonment (2).

The speech (*c*) (paragraph 7) was practically a repetition of (*b*), with additional details as to the question of the pipes. It contained the words, "They" (meaning the plaintiffs) "have never been willing, as honourable and honest contractors, to carry out the conditions of the contract"; and then suggested the necessity of a sworn inquiry. Innuendoes (i) (paragraph 8) that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct; (ii) (paragraph 9) that they were guilty of bribery and corruption, and of a criminal offence, punishable by imprisonment.

Letter (*d*) contained the following, relied on in paragraph 12 :—"The members of the Council, if there be any, who are willing to champion a job of this kind should, at the first opportunity, be turned right-about-face, and

(1) The letter was, in fact, prefaced by a question, whether the Lord Mayor's statement, reported in the Dublin papers of the 8th instant, was correct, and proceeded—"In view of such a statement" immediately before the words in paragraph 10. See the judgment of the Lord Chief Justice, *infra*, page 576, where the letter is set out in full.

(2) 52 & 53 Vict. c. 69, s. 1.

receive such a parting kick—I speak metaphorically, of course—as they would feel and remember for the balance of their earthly existence." Innuendo (paragraph 13), that the plaintiffs' contract with the Corporation was a corrupt and disgraceful job.

In addition to traverses, the defendant pleaded, as to the speeches, that the words were not defamatory, and privilege (upon which, however, except as to the pipes, no question arose, there being, as the Judge held, no evidence that the defendant believed in the truth of the charges other than as regards the pipes). As to the letters, he pleaded "No libel," privilege, fair comment, and justification in the ordinary signification of the words.

The jury found the publication of both speeches and both letters; that the words relating to the drainage pipes, but not the others, were spoken in relation to the profession and business of the plaintiffs as contractors, and that the letters were written of and concerning the plaintiffs. They found that the words relating to the drainage pipes were privileged.

As to letter (*a*), they found in favour of the innuendo, but found no libel; privilege; fair comment; and justification in the natural and ordinary signification of the words.

As to speech (*b*), they found in favour of innuendo (i), but against innuendo (ii). As to speech (*c*), they found in favour of innuendo (i), but against innuendo (ii). As to letter (*d*), they found in favour of the innuendo, but found no libel; privilege; fair comment; and justification in the natural and ordinary signification of the words.

The Judge at the trial, holding this to be a verdict for the defendant, entered judgment for him. The Judge was of opinion that the jury thoroughly understood the cause of action, the questions submitted, and the charge, and that there was nothing to indicate perversity in their conduct.

The plaintiffs having moved for a new trial, on the grounds, *inter alia*, that the jury did not correctly understand or appreciate the questions submitted to them, and counsel in argument contending that the answers were inconsistent and repugnant:—

Held, by the King's Bench Division (Lord O'Brien, L.C.J., and Madden, J.; Gibson, J., *diss.*), that the verdict for the defendant should stand.

Held, by Lord O'Brien, L.C.J., that letter (*a*), read as a whole, was incapable of being a libel on the plaintiffs; further, that the finding of the jury on the plea of justification, in the ordinary sense and signification of the words, was right in form, simple in language, and absolutely correct. As to the oral slanders, the findings in favour of privilege with regard to the charges about the pipes disposed of the question; and as to letter (*d*), on reading the whole of it, the alleged libel was of a very mitigated type, and was answered by the finding on the plea of justification, which there was, in his Lordship's opinion, ample evidence to sustain. In such a case, where the verdict is obviously honest and well considered, and approved of by the Judge at the trial, the Divisional Court should be astute to render the findings consistent.

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Per Gibson, J. (admitting that there were no grounds for attributing perversity to the jury), the findings, except as regards speech (*c*), were so contradictory and uncertain, that a new trial could not be avoided.

Per Madden, J.: Though some of the findings were unsatisfactory, they did not support any allegation of perverseness on the part of the jury, or misunderstanding of other issues in the case, or affect the result of the trial, and that a re-trial was therefore unnecessary.

The judgment of the King's Bench Division was affirmed by the Court of Appeal.

ACTION for libel and slander, tried before Andrews, J., and a special jury of the county of Dublin on the 5th November, 1907.

The pleadings were as follows:—

STATEMENT OF CLAIM.

1. The plaintiffs carry on in partnership, at 5 Talbot Place, Dublin, the profession and business of contractors.

2. The defendant is, and was at the time of the publication of the slanders complained of, a member of the Corporation of Dublin.

3. Prior to the time of the publication of the slanders hereinafter complained of, the plaintiffs had tendered for the construction of certain sewers, mains, stations, and other works in the Clontarf Wards of the city of Dublin. The tender delivered by the plaintiffs was recommended for acceptance by the Improvements Committee of the said Corporation, being the committee charged with the management and control of the city sewers, and was subsequently approved and accepted by the said Corporation on the 7th day of January, 1907. The defendant was aware of the foregoing matters at the time of the matters complained of.

4. On the 4th day of March, 1907, the defendant, in a speech delivered by him at a meeting of said Corporation in the City Hall, Dublin, falsely and maliciously spoke and published of the plaintiffs, in relation to their profession and business of contractors, and the carrying on and conducting thereof by them, the following words:—

> 1. "Mr. Chatterton had specified that the best stoneware pipes should be used in the Clontarf main drainage, and what happened? Mr. Crawford" (meaning one of the plaintiffs) "ordered an inferior second-class glazed earthenware pipe and the sample of that second-class pipe was in the possession at the present moment of the borough surveyor. Had these gentlemen" (meaning the plaintiffs) "succeeded in getting this contract without the matter being challenged, what would have happened if the borough surveyor of Dublin had been foolish enough to have passed this pipe? The whole main drainage of Clontarf would have been affected, and Messrs. Crawford & Frame" (meaning the plaintiffs) "would have made close on £2000 by that

transaction. Now if they added that £2000 to the £1251 of premium the Corporation proposed to pay with the view of encouraging the establishment of a new industry in Dublin, they would get a sum of over £3000.

And also the words :—

"Were those gentlemen" (meaning the plaintiffs) "coming into this place with clean hands? It was not more than a month ago that the junior partner of that firm" (meaning the plaintiffs) "was charged by a member of that Corporation with attempting to corrupt a member of that body by offering him a bribe of £50. He did not know whether that charge was true, but it would not surprise him if it were true in face of what he had related. He mentioned this transaction deliberately, and on purpose to show that they were dealing with men" (meaning the plaintiffs) "who were not what they ought to be."

And also the words :—

"He had been told that day that Alderman Cotton, and it was to his credit, arranged to dissociate himself entirely from this shady and very ugly transaction; in fact, he took it from the alderman's own mouth. How did these adventurous gentlemen" (meaning the plaintiffs) "succeed in button-holing and capturing members of that Council in order that they might further their interests, not only before the Local Government Board, but in that Council itself? All knew how eloquently their case" (meaning that of the plaintiffs) "was put forward by Alderman Irwin, and they knew something about Alderman Farrell's advocacy. Both gentlemen were directly or indirectly pecuniarily interested."

And also the words :—

"We are unfortunately connected with men" (meaning the plaintiffs) "charged with deliberate corruption. It was a very hard thing to give a contract into the hands of a man who had made no attempt to clear himself of the charge. Another gentleman had been deliberately charged with taking this bribe, and that gentleman was sitting in the Council at the present time."

And also the words :—

"We are determined to clear this Council once and for ever of this class of men, whether he is engaged as a contractor" (meaning the plaintiffs) "or sits in this Council."

And also the words :—

"I am determined that whatever the Council may do, Messrs. Crawford & Frame" (meaning the plaintiffs) "won't get this contract, even if it should come to putting these men into the box before the Lord Chief Baron. I think it my duty to ask the Local Government Board for a sworn inquiry, and I believe that the majority of the members of this Council would willingly go into the box and come

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out of this matter with a perfectly clear character, but in saying that I am not sure that certain gentlemen would come out of it with a clear character."

5. The plaintiffs repeat paragraph 4 hereof and say that the said words complained of mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors.

6. The plaintiffs repeat paragraph 4 hereof, and say that the said words therein complained of mean that the plaintiffs had been guilty of a criminal offence punishable by imprisonment.

7. The plaintiffs further complain that on the 11th day of March, 1907, the defendant falsely and maliciously spoke and published of the plaintiffs, in relation to their profession and business of contractors, and the carrying on and conducting thereof by them, the words following:—

1. "In moving the motions which I propose to submit with the permission of the Council—we are concerned in this matter to a very large extent—I shall take this letter seriatim and show you that these gentlemen" (meaning the plaintiffs) "do not come into this Council with clean hands; and if they did not come into this Council with clean hands on this day week, their hands are dirtier than they were then."

And also the words:—

"Mr. Chatterton had specified that the best stoneware pipes should be used for the contract. I want to pay particular attention to the word 'stoneware.' Therein exists the gravamen of the charge. It is the sending of the specimen, instead of a sample of stoneware pipes. It was an inferior pipe—a second-class earthenware glazed pipe. Well, Mr. Chatterton had specified, and what happened? Mr. Crawford" (meaning one of the plaintiffs) "ordered an inferior, second-class, glazed, earthenware pipe, and the sample of that second-class pipe was in the possession at the present moment of the borough surveyor. Had these gentleman" (meaning the plaintiffs) "succeeded in getting this contract without the matter being challenged, what would have happened if the borough surveyor of Dublin had been foolish enough to have passed this pipe? The whole main drainage of Clontarf would have been affected; and Messrs. Crawford & Frame" (meaning the plaintiffs) "would have made close on £2000 by that transaction. Now, if they added that £2000 to the £1251 of the premium that the Corporation proposed to pay with a view to encouraging the establishment of a new industry in Dublin, they would get a sum of over £3000."

And also the words:—

"Do these gentlemen" (meaning the plaintiffs) "suggest that Mr. Kelly, of Kilkenny, was about to play the same fraud on the

Corporation that they attempted? That is the meaning of the words. No other meaning can be placed upon them."

And also the words :—

"Now, gentlemen, this eminent firm" (meaning the plaintiffs) "these gentlemen, Mr. Crawford said, assured him when getting this sample pipe, this second-class earthenware pipe, that it would pass the borough surveyor of Dublin. I have not a shadow of doubt it would pass the borough surveyor if it was offered as a second-class earthenware pipe. It would probably be equal to any manufactured in the United Kingdom. But does he mean to insinuate that it would pass the borough surveyor as a first-class stoneware pipe? I find it impossible to believe that Messrs. Brown knew, or assured him, that the surveyor would pass this earthenware pipe. By this suggestion he puts Messrs. Brown in the same category as himself, and aiding and assisting in the perpetration of a fraud."

And also the words :—

"I have said before, I have it on the best authority, from a city not very far from Dublin, that they would have made £2000 profit by this attempt, if it had been successful, to foist upon the Corporation not an inferior pipe, but a quality of pipe other than what was specified for by Mr. Chatterton, that is to say, an earthenware, glazed, second-class. I emphasize the statement that the men guilty of that transaction" (meaning the plaintiffs) "are not coming into the Corporation with clean hands. That is absolutely certain. They are not coming with clean hands."

And also the words :—

"Immediately after that interview between Mr. Kelly of Kilkenny and Mr. Crawford, the Corporation then—why not before then?—decided not to give the contract to Mr. Kelly, as he could not get sufficient security, that is what Crawford & Frame say" (meaning the plaintiffs). "The matter was allowed to drop. Crawford & Frame" (meaning plaintiffs) "seem to know all about it. How did these gentlemen get possession of all this material? Where did they get it? Was there some connecting link between Crawford & Frame" (meaning the plaintiffs) "and the Corporation? I would not be surprised if that connecting link was sitting here to-day.

"It is to the eternal credit of the Town Clerk that be it said he has done his best—if there be any dirty work at the bottom of this, and I believe there is—he has done his very best to drag it to light."

And also the words :—

"They" (meaning the plaintiffs) "have been ready and willing to go on, there is no doubt. Apparently they" (meaning the plaintiffs) "are willing to go on with the work, but not willing to carry out the conditions of the contract. They" (meaning the plaintiffs) "have

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never been willing or shown willingness from the very first to the last as honourable and honest contractors to carry out the conditions of the contract."

And also the words :—

"Let them get a sworn inquiry into this contract, and we will show it would have been certainly impossible to employ Messrs. Crawford & Frame" (meaning the plaintiffs) "after all that has been done ; and, gentlemen, immediately we have a sworn inquiry, we will put some gentlemen into the box, and put the Local Government Board in the box."

8. The plaintiffs repeat paragraph 7 hereof, and say that the said words therein complained of mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were not fit and proper persons to be employed as contractors.

9. The plaintiffs repeat paragraph 7 hereof, and say that the said words therein complained of mean that the plaintiffs had been guilty of bribery and corruption, and of a criminal offence punishable by imprisonment.

10. As a separate cause of action the plaintiffs complain that on or about the 19th January, 1907, the defendant falsely and maliciously wrote and published, and also printed and published of and concerning the plaintiffs, the words following, that is to say (1) :—

"It is easy to understand how the Council was induced by a large majority to adopt this report, the result of which is to put a tax of £1250 on the already sorely burdened ratepayers. If the statement be correct, I do not see the possibility of any efforts, however strenuous, being successful in narrowing the way that leads to corruption ; on the contrary, your action will have the effect of broadening it."

11. The plaintiffs repeat the averments in the 10th paragraph, and say that the words therein complained of mean that plaintiffs were guilty of corruption and dishonesty in their efforts to procure a contract with the Dublin Corporation.

12. The plaintiffs further say that on or about the 9th March, 1907, the defendant falsely and maliciously wrote and published, and also printed and published of and concerning the plaintiffs, the words following, that is to say :—

"The citizens will wait the result of Monday's special meeting with more than ordinary interest. The members of the Council, if there be any, who are willing to champion a job of this kind should at the first opportunity be turned right-about-face, and receive such a parting kick—I speak metaphorically, of course—as they would feel and remember for the balance of their earthly existence.—Yours truly,

"FRANCIS VANCE.

(1) See *ante*, p. 522, note (1).

"P.S.—At Monday's special meeting, when the Town Clerk has read the letter addressed to him by Messrs. Crawford & Frame—a copy of which appears in to-day's *Express*—I will effectively dispose of its contents."

13. The plaintiffs repeat the 12th paragraph, and say that the words therein complained of mean that the plaintiff's contract with the Dublin Corporation was a job so corrupt and disgraceful that every member of the Corporation who voted for it should be driven from office and from public life, and that plaintiffs' letter in reference to their said contract was a misleading and untrustworthy document.

14. By reason of the premises the plaintiffs have been and are injured in their said profession and business, and have suffered in their credit and reputation as contractors.

The plaintiffs claim damages £2000.

DEFENCE.

1. The defendant does not admit that the plaintiffs did carry on, or do now carry on, the profession and business of contractors, or that they were or are partners.

2. The defendant does not admit that the tender delivered by the plaintiffs was recommended for acceptance by the Improvements Committee, or that the same was accepted by the Corporation as in paragraph 3 of the statement of claim is alleged, or at all, or that he was aware of said matters.

3. The defendant did not speak, or publish, the words referred to in paragraph 4 or 7 of the statement of claim.

4. The said words did not refer to, and were not published of, the plaintiffs.

5. The said words did not refer to the plaintiffs' alleged business or profession, or to the plaintiffs in relation thereto.

6. The said words were not spoken or published, nor do they bear the meaning or meanings alleged by the plaintiffs in paragraph 5, 6, 8, and 9 of the statement of claim or any defamatory meaning.

7. The defendant will object that the said words are not defamatory in themselves, and that no circumstances are alleged showing them to have been used in any defamatory sense, and that they are insufficient in law to sustain the action.

8. For a further defence the defendant says that the said words were spoken and published by him without malice, and in the belief that they were true, and under such circumstances as to make them a privileged communication.

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Particulars are as follows :—

A. On or about the 8th day of December, 1906, the Improvements Committee of the Corporation of Dublin advertised for tenders for the construction of sewers and other works in connexion with the main drainage of Clontarf. Seven tenders were received, including one from the plaintiffs, under the style and designation of "Messrs. Crawford & Frame." Plaintiffs' tender was higher by £1251 8*s.* 2*d.* than the lowest tender sent in. On the 7th day of January, 1907, a monthly meeting of the Municipal Council was held, at which a resolution was proposed that Report No. 256 (being a report of the said Improvements Committee recommending the acceptance of the tender of the plaintiffs) should be adopted, and the defendant was present at the said meeting in his capacity as member of the said Council. At the said meeting the Lord Mayor of Dublin (Councillor Nannetti) stated that the Improvements Committee had recommended the acceptance of plaintiffs' tender for reasons which it was not politic to mention, but which could be ascertained from the Committee. He further stated that the plaintiffs would start a foundry in Hammond Lane, Dublin, for the making of the pipes.

B. The plaintiffs by their said tender undertook to carry out the work in strict accordance with the specifications prepared by the Engineer of the Municipal Council of Dublin. It was provided by the said specifications that all the sewers should be of stoneware pipes of the first quality ; yet the plaintiffs in fact ordered an inferior class of pipe, to wit, a glazed earthenware pipe, and submitted same to the borough surveyor for approval. The difference in price between the said earthenware pipe and the stoneware pipes of the first quality would on the whole contract amount approximately to £2000.

C. At a meeting of the said Council held on the 4th day of February, 1907, there was a discussion as to the propriety of giving the contract to the plaintiffs. In the course of the said discussion, Alderman Kelly and Alderman Cole severally spoke, and openly stated that they had each of them been informed by Alderman Irwin that David Frame, one of the plaintiffs, had given Alderman Farrell a sum of £50 with a view to procuring his influence with the Council to induce the said Council to give the contract to the plaintiffs.

D. At the time when the statements complained of were made, the plaintiff David Frame was chairman of the Hammond Lane foundry. The list of shareholders in the said foundry included the names of Alderman Farrell and Miss Annie E. Irwin.

E. The defendant says that all the matters aforesaid, and other matters connected therewith, were known to him prior to the said

meeting of the said Council on the 4th day of March, 1907, and the defendant spoke and published the words complained of in paragraph 4 of the statement of claim, at the said meeting, and as a member of such Council, when the propriety of giving the said contract to the plaintiffs was under discussion, this being a matter in which the defendant had an interest, and in reference to which he had a duty to discharge, and the persons to whom the said words were spoken and published were the members of the said Council present, who had as such members an interest in the said matter, and in reference to which they had a duty to perform. The occasion was therefore privileged.

F. As to paragraph 7 of the statement of claim, the defendant says that when he spoke the words complained of therein, he was aware of all the matters set out in paragraph 8 (sub-paragraphs A, B, C, and D), and also that the plaintiff had sent a certain letter to the Town Clerk of the Dublin Corporation, dated the 8th March, 1907, which was read at the said meeting of the 11th March, 1907, and the defendant spoke and published the words complained of in the said 7th paragraph of the statement of claim at the said meeting without malice, and believing the same to be true, and as a member of the said Council when the subject of the said contract with the plaintiffs was under discussion, this being a matter in which the defendant had an interest, and in reference to which he had a duty to discharge, and the persons to whom the said words were spoken and published were the members of the said Council present, who as such members had an interest in such matter, and in reference to which they had a duty to perform. The occasion was therefore privileged.

9. The defendant did not write or publish the words referred to in paragraph 10 or 12 of the statement of claim.

10. The words complained of in the said paragraphs 10 and 12 did not refer to, and were not published of, the plaintiffs.

11. The said words were not written or published with, nor do they bear, the meaning alleged by the plaintiffs, nor any defamatory meaning. They are incapable of any such meaning or of any defamatory meaning.

12. The said words are no libel.

13. As regards the words in paragraphs 10 and 12 of the statement of claim complained of, the defendant says that the words were written and published by him without malice, and in the belief that they were true, and under such circumstances as to make them a privileged communication.

"Particulars.—The defendant repeats sub-paragraphs A, B, C, D, E, and F of paragraph 8, above, and says that he is and, at the time of writing and publishing the said words complained of, was a ratepayer of the city of Dublin, and a member of the Municipal Council, and the defendant knowing the matters contained in said sub-

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paragraphs of paragraph 8, wrote and published the said words complained of, believing the same to be true and without malice, in reply to letters written and published by the plaintiffs, for the purpose of calling attention of the ratepayers of the City of Dublin to the action of the Municipal Council in proposing to accept a tender higher than the lowest tender in connexion with the main drainage of Clontarf, a matter in which the defendant had an interest, and in respect of which he had a duty to discharge. The occasion was therefore privileged.

14. For a further defence the defendant says that in so far as the said words complained of in paragraphs 10 and 12 of the statement of claim consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice, upon the said facts which are matters of public interest.

15. As regards the words complained of in paragraphs 10 and 12 of the statement of claim, the defendant says that the said words, without the meaning set forth in paragraphs 11 and 13 of the statement of claim, and according to their natural and ordinary signification, are true in substance and in fact.

The plaintiffs joined issue on the defendant's statement of defence.

The following questions were left by the learned Judge to the jury, and their answers are appended. There was no objection to these questions by counsel on either side:—

1. Did the defendant speak and publish the words in paragraph 4 of the statement of claim complained of? Yes.

2. Did the defendant speak and publish the said words in relation to the profession and business of the plaintiffs as contractors? Yes.

3. Did the said words mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors? Yes.

4. Did the said words mean that the plaintiffs had been guilty of a criminal offence punishable by imprisonment? No.

5. Were the words in paragraph 4 of the statement of claim complained of which refer to the drainage pipes spoken and published by the defendant of the plaintiffs in relation to their profession and business of contractors, and in a defamatory sense? Yes.

6. If so, did the defendant speak and publish these words without malice, and in the belief that they were true? Yes.

6a. Do the words in the said paragraph 4 complained of, other than the

words which refer to the drainage pipes, impute defamatory charges against the plaintiffs in relation to their profession and business of contractors? No.

6*b*. If so, I direct you to find that the defendant has not proved his defence of privileged communication in relation to those words (paragraph 8 of his defence), as there is no evidence that he believed such defamatory charges to be true, and his evidence is that he never made them. (*No answer.*)

7. Did the defendant speak and publish the words in paragraph 7 of the statement of claim complained of? Yes.

8. Did the defendant speak and publish the said words in relation to the profession and business of the plaintiffs as contractors? Yes.

9. Did the said words mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were not fit and proper persons to be employed as contractors? Yes.

10. Did the said words mean that the plaintiffs had been guilty of bribery and corruption, and of a criminal offence punishable by imprisonment? No.

11. Were the words in paragraph 7 of the statement of claim complained of which refer to the drainage pipes spoken and published by the defendant of the plaintiffs in relation to their profession and business of contractors, and in a defamatory sense? Yes.

12. If so, did the defendant speak and publish these words without malice and in the belief that they were true? Yes.

12*a*. Do the words in the said paragraph 7 complained of, other than the words which refer to the drainage pipes, impute defamatory charges against the plaintiffs in relation to their profession and business of contractors? No.

12*b*. If so, I direct you to find that the defendant has not proved his defence of privileged communication in relation to these words (paragraph 8 of his defence), as there is no evidence that he believed such defamatory charges to be true, and his evidence was that he never made them? (*No answer.*)

13. Did the defendant write and publish the words in the 10th paragraph of the statement of claim? Yes.

14. Were the said words written and published of and concerning the plaintiffs? Yes.

15. Did the words mean that the plaintiffs were guilty of corruption and dishonesty in their efforts to procure a contract with the Corporation? Yes.

16. Are the words a libel? No.

17. Were the said words written and published by the defendant without malice, and in the belief that they were true? Yes.

18. Were the said words written and published as a fair and *bona fide* comment, and without malice? Yes.

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19. Were the said words true in substance and in fact according to their natural and ordinary signification? Yes.

20. Did the defendant write and publish the words in the 12th paragraph of the statement of claim complained of? Yes.

21. Were the said words written of and concerning the plaintiffs? Yes.

22. Did the said words mean that the plaintiffs' contract with the Dublin Corporation was a job so corrupt and disgraceful that every member of the Corporation who voted for it should be driven from office, and from public life, and the plaintiffs' letter in reference to their said contract was a misleading and untrustworthy document? Yes.

23. Are said words a libel? No.

24. Were the said words written and published by the defendant without malice, and in the belief that they were true? Yes.

25. Were the said words written and published as a fair and *bona fide* comment, and without malice? Yes.

26. Were the said words true in substance and fact according to their natural and ordinary signification? Yes.

27. What damages are plaintiffs entitled to—

(*a*) In respect of the matters in the 4th paragraph of the statement of claim? (*No answer.*)

(*b*) In respect of the matters in the 7th paragraph? (*No answer.*)

(*c*) In respect of the matters in the 10th paragraph? (*No answer.*)

(*d*) In respect of the matters in the 12th paragraph? (*No answer.*)

Upon these findings the jury found for the defendant, the Judge having stated, without objection, that this amounted to a verdict for the defendant.

The Judge gave judgment for the defendant, with costs, on all the plaintiffs' causes of action.

The plaintiffs moved that the verdict and judgment entered for the defendant be set aside, and that a new trial be directed, and that the costs of the trial already had, and the costs of this motion, abide the result of the new trial so directed, on the grounds that the verdict was against the evidence and the weight of evidence, and that the findings showed either that the conduct of the jury was perverse, or that they did not correctly understand or appreciate the meaning of the questions submitted to them.

The facts of the case are fully set forth in the judgments of Gibson and Madden, JJ.

Ronan, K.C., The Right Hon. James H. Campbell, K.C., Healy, K.C., and *T. Sullivan*, for the plaintiffs.

Henry, K.C., Moriarty, K.C., and *Longworth*, for the defendant.

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MADDEN, J.:— May 18.

This is an action of defamation, founded upon two speeches made by the defendant at two meetings of the Corporation of Dublin, and upon two letters, one of which was addressed to the Local Government Board and the other to the public Press. The case was tried by Andrews, J., and a special jury of the county of Dublin. The trial occupied several days, and resulted in answers of the jury to the questions (twenty-six in number) upon which the learned Judge directed a verdict and gave judgment for the defendant.

The application before us is that the verdict and judgment should be set aside, and a new trial directed, on the grounds that the verdict was against evidence and the weight of evidence, and that the findings show that either the jury were perverse, or that they did not correctly understand or appreciate the meaning of the questions submitted to them.

It will be my duty to consider in some detail the questions raised by the pleadings, and the answers of the jury. Before doing so, and in order to render my observations intelligible, it is necessary that I should review the facts of the case, as proved in evidence at the hearing.

The Corporation of Dublin, being about to execute extensive drainage works in connexion with Clontarf, advertised in the ordinary way for tenders. The lowest tender, that of a contractor named Kelly, was adopted. Kelly appears to have been unable to provide the requisite security, and the contract was again advertised on the 8th December, 1906. Seven tenders were submitted. The lowest was that of Messrs. Binns of Croydon, for £46,342; the next that of the plaintiffs, Messrs. Crawford & Frame, for £47,593: the difference between these two tenders being the sum of £1251. The tenders came for consideration before the Improvements Committee of the Corporation, who

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reported, on the 21st December, 1906, in the following terms:—"We carefully considered the tenders at a special meeting held to-day, and decided to recommend for acceptance by the Municipal Council the lowest tender received from a local firm, viz., Messrs. Crawford & Frame, Talbot Place, Dublin, for the sum of £47,593 15*s.* 11*d.* . . . Mr. Frame came before to-day's meeting, and informed us that the castings in connexion with the contract would be made in the Hammond Lane Foundry, which we believe will give much-needed encouragement to a deserving local industry, and in confirmation of which statement we append the following copy of a letter from the tendering firm." This letter is as follows:—"We confirm the conversation we had with your committee last Monday, that is, that all the manholes and special castings in connexion with the Clontarf main drainage will be made by the Hammond Lane Foundry Co., Ltd., and we also undertake to employ none but Dublin labour (except about six foremen, whom we may have to bring over from the other side)."

It is to be observed that the written undertaking given by the plaintiffs is not identical in terms with their oral statement, as understood by the committee, that the castings in connexion with the contract would be made at Hammond Lane. But that it was the same in substance appears from a letter, dated the 5th February, 1907, addressed to the city surveyor, and referred to in his report of the 14th February. In it Mr. Harty says—"They [the plaintiffs] state that they confirm their letter of the 2nd January, 1907, to Mr. Tobin, 'that all the manholes, special castings, *and ironwork* in connexion with the Clontarf main drainage will be made in Dublin, except the straight lengths of pipes and valves,' &c." This latter statement is not confined to "manholes and special castings," whatever may be included in those terms, but extends to ironwork generally, with certain exceptions, which are evidently treated as immaterial, and it fully justifies the representation of the Improvements Committee and the belief of the Corporation, in considering the tender of the plaintiffs, that the tender was accompanied with an undertaking that substantially the whole of the ironwork required in connexion with the contract would be done in the Hammond Lane Foundry.

The Hammond Lane Foundry referred to in this report was a

recently formed limited liability company, with a capital of £9000, of which £3159 appears to have been paid up. It was stated by the Lord Mayor, in recommending the acceptance of the plaintiffs' tender, that it had been started by Frame for the casting of the necessary pipes for the purpose of the contract.

The report of the Improvements Committee came before the Corporation on the 7th January, 1907. It appears from the proceedings of the Municipal Council that standing orders were suspended to enable the Council to take the report into consideration. A resolution adopting the report was carried by an overwhelming majority—41 voting for the motion, and 4, of whom the defendant was one, against it. The report of the proceedings at this meeting, which is in evidence, leaves no doubt as to the reasons which led the Corporation to accept a tender which was over £1200 in excess of the lowest. No question was suggested as to the competence or solvency of Messrs. Binns, who had sent in the lowest tender. The Lord Mayor is reported to have said that it was decided, notwithstanding the tender of Messrs. Binns, to give the contract to an Irish firm. The firm of Crawford & Frame selected were to do everything connected with the work in Ireland, and they were starting a foundry in Hammond Lane for the casting of the necessary pipes. There is no doubt that the Lord Mayor, in making this statement to the meeting, acted in perfect good faith. In fact, he was only repeating the report of the Improvements Committee, founded on the representations made to them by the plaintiffs. Neither the supporters nor the opponents of the motion appear to have had at that time any doubt as to the *bona fides* of this representation. The defendant strongly opposed the acceptance of the tender, on the ground that it was imposing a tax of £1250 on the ratepayers in order to put this money into the plaintiffs' pockets. He is reported to have said that nothing more inherently vicious, or more calculated to lead to corruption upon a colossal scale, had come under his notice for a long time. He did not suggest that there was actual corruption in the case; but he apprehended the danger of corruption. He did not suggest any doubt as to the truth of the representation before the Corporation.

I am not concerned with the merits of the proposition discussed

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at this meeting, or with the question whether the Corporation would have been justified in subjecting the ratepayers to additional taxation in order to foster a local industry. I simply note that they were induced to accept the plaintiffs' tender, though not the lowest, on the faith of the statement in the report of the Improvements Committee, endorsed by the Lord Mayor, that the casting of the necessary pipes would be done by a Dublin firm.

A further statement was made at this meeting of minor importance, which it is necessary to mention. The Lord Mayor is reported to have said that he had waited on the Local Government Board with Alderman Cotton; that the Local Government Board met them sympathetically, and said that they had made out a good case for accepting the contract of Messrs. Crawford & Frame. The defendant, at the meeting, complained of the action of the Lord Mayor and Alderman Cotton, which he described as going to the Local Government Board behind the backs of their colleagues; and on the 10th January he wrote to the Local Government Board a letter which is one of the alleged libels. I shall deal with this letter and with the findings of the jury with reference to it presently. It is sufficient here to say that the Local Government Board in a reply dated the 15th January disclaimed the interpretation put on their action by the Lord Mayor, and stated that they had pointed out that while the Corporation were not legally bound to accept the lowest or any tender, they should be prepared to satisfy the auditor that where the lowest tender was not accepted it was a reasonable exercise of their discretion, and that they acted in good faith in the matter.

The defendant on the 17th January, 1907, wrote to the Lord Mayor a letter, asking for an explanation of certain statements made by him at the meeting of the 7th. I need not go into the correspondence in detail. But it is important to note that the Lord Mayor in his reply of the same date wrote: "I adhere to the statement that all the pipes were to be manufactured in this country at their" (the plaintiffs') "foundry, and thus create a new industry in our midst."

It is evident that some matters must have come to the knowledge of the defendant, subsequently to the meeting of the 7th January, which led him to doubt whether the representation of

the plaintiffs as to the ironwork being done in Dublin would be made good. Passing by some unimportant letters, I find that the defendant, on the 19th January, 1907, addressed the following letter to the town clerk:—

"*Re* CLONTARF MAIN DRAINAGE.

"DEAR SIR,—As the adoption of the report has been secured by misstatements of facts, I, being a member of the Council and a ratepayer of the city, hereby caution you against placing the city seal to any contract that would involve the ratepayers in a payment of £1250 more for the work to be done than the sum set forth in the lowest tender. As the matter is serious and urgent, it will be well to bring this letter before the Council at the next monthly meeting, at which meeting the Council may, if it so decides, when all the facts have been submitted and considered, issue or confirm such direction as to the placing of the city seal as may be necessary.

"Yours faithfully,

"FRANCIS VANCE."

This letter was read at a meeting of the Corporation on the 4th February, whereupon the following resolution was put and carried:—"That the seal be withheld until the borough surveyor reports to this Council upon the question of whether the entire ironwork can be cast in the Hammond Lane Foundry, and that a clause should be embodied in the contract bond accordingly." This resolution, which appears to have been carried without opposition, affords additional evidence, if such were required, that the action of the Corporation on the 7th January was influenced by a belief that the entire of the ironwork would be done in a Dublin foundry. The defendant is reported to have stated at the meeting of February 4th that if the plaintiffs would sign a bond to the effect that the whole of the work would be done in Hammond Lane Foundry, he would withdraw his opposition to their getting the contract. The issue raised was unfortunately, as often happens, obscured by the introduction of a personal matter, quite unconnected with the general question, which was evidently of public importance. This personal question was more fully developed at the next meeting of the Corporation on the 11th March.

The report of the city surveyor, Mr. Harty, is dated the 14th November, 1907. He says that he went carefully into the bill of

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quantities, with a view of seeing what portion of the ironwork could be manufactured in Dublin; and that having gone through the items with the plaintiff, Mr. Frame, the net result is as follows: Ironwork to the amount of £2062 3*s.* would be done in Dublin. Mr. Frame stated that he expected that certain work called "ejector castings" would be done at his foundry. Mr. Harty had referred this question to Mr. Chatterton, the engineer. The result of this communication is thus stated by Mr. Harty: "Mr. Chatterton, with whom I have been in communication on the subject, considers it out of the question for Messrs. Crawford & Frame to make the ejector chamber castings. This work is estimated at £1500. The work as to which it is definitely reported "it could not be done in Dublin" is estimated at £1447 1*s.* 3*d.* I pass by some items of less importance, amounting to £364. Mr. Harty adds: "In view of the fact that the resolution of the Council deals with the 'entire ironwork,' I have deemed it necessary to deal above both with the wrought-iron and steel work, though it is common knowledge neither is manufactured." From this report it appears that of ironwork amounting to £5009, work valued at £2947 might be deducted: £1447 as absolutely impossible to be done in Dublin; and £1500 according to the opinion of Mr. Chatterton, the engineer, whose estimate might reasonably be accepted by the Corporation.

This report, the most important document in the case, came before the Corporation at their meeting of the 4th March. It was at this meeting that the defendant made the speech, extracts from which are set forth in the 4th paragraph of the statement of claim, and constitute what is complained of as the first slander. I shall have occasion to refer to this speech in detail; at present I note that when it was delivered the speaker and the Council had become aware that the resolution adopting the contract had been obtained upon a representation which could not be made good, as to a matter which they might reasonably suppose to have been within the knowledge of the plaintiffs. Their appreciation of the position is evidenced by the following resolution, which was passed without a division:—"That, having heard the borough surveyor's report and Mr. Chatterton's letter, and also having regard to all the circumstances of the case, it is to the best interests of this Cor-

poration that no further steps in connexion with the main drainage of Clontarf be taken by which the contract would be given to Messrs. Crawford & Frame; therefore a special meeting of this Council be summoned by the Lord Mayor for the purpose of rescinding the resolution which was passed as above, and to decide further action in the matter."

The special meeting of the 11th March was summoned in accordance with this resolution, and in consequence a requisition signed by twenty-seven members in the following terms:—"We, the undersigned, request your Lordship to call a special meeting for the purpose of rescinding the resolution on which the Council adopted the report giving the main drainage contract (Clontarf) to Messrs. Crawford & Frame." It appears that at this meeting, held on March 11th, at which fifty-two members were present, the following resolution was carried without a division:—"That the resolution (item 3 in the printed minutes of 7th January, 1907), adopting the report (No. 256 of 1906) of the Improvements Committee, recommending the acceptance of the tender of Messrs. Crawford & Frame for the carrying out of the main drainage of Clontarf, be, and the said resolution is, hereby rescinded."

It is quite clear from the report of the proceedings at this meeting that the resolution of the 7th January was unanimously rescinded on the 11th March, because the Corporation were satisfied that they had been, in the language of Alderman Cotton, "deceived." That gentleman, who had, with the Lord Mayor, taken an active part, rightly or wrongly, in securing the adoption of a contract which he believed would benefit Dublin by encouraging local industry, is reported to have said—"He should like to set himself right with the Council, and also the Lord Mayor. He had no hesitation in saying that they were both deceived, not only himself but the committee. There was a distinct understanding that the whole of the casting was to be done in Dublin, and they were also informed that special apparatus—because he himself knew that some of the casting could not be cast in Dublin without special apparatus—was to be brought over, and a new business was to be started in Dublin." The "deceivers" were, of course, the plaintiffs in this action of defamation. The speech of

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the defendant on this occasion is that from which extracts are set forth in the 7th paragraph of the statement of claim. It deals with other matters besides the special matter which the meeting was convened to consider; but, so far as it was conversant with the manner in which the acceptance of the plaintiffs' contract had been obtained, no reasonable jury would be disposed to confine the range of discussion and fair comment within narrow limits.

One of the topics discussed at this meeting was the question of the pipes. Having regard to the findings of the jury on this part of the case, and to the course of the argument before us, it will not be necessary to enter in detail into the voluminous evidence relating to this branch of the case. The plaintiff, in his evidence, says: "I had read the specification. My tender was on the basis of it. I was to use stoneware pipes." It was also provided that the pipes used should be approved by Mr. Harty, the city surveyor. There appears to be another kind of pipe known as glazed earthenware, and that this kind of pipe had been accepted as satisfactory for the purpose of certain other drainage works executed by the Corporation. There is conflicting evidence as to the relative cost of stoneware and glazed earthenware pipes. But it appears that, speaking generally, the latter is the less expensive article. Mr. Simmons, the Dublin traveller for Brown & Sons of Paisley, manufacturers of drainage pipes, was examined for the defendant. He stated that the plaintiff Crawford mentioned to him that he had a pipe which would cost considerably less than the witness's stoneware pipes, and would pass any engineer in the United Kingdom. This witness, referring to a conversation with the defendant, stated—"I then mentioned to Mr. Vance, with regard to the prices of our stoneware pipes against our ordinary extra-glazed, if it had been approved of, the difference would have been between £1500 and £2000. Mr. Vance asked me if I would have any objection to his using my information in connexion with this matter. I said I would not." On the other hand, Mr. Crawford denied that the plaintiff would have made £2000 out of this—"Nothing of the kind"—and he produced quotations of stoneware pipes and ordinary extra-glazed, according to which the advantage in point of cheapness would be in favour of the former.

Whatever be the merits of this controversy, which occupied a good deal of the attention of the jury, it has been closed by the findings of the jury. It would seem from the defendant's speeches, and from his evidence on cross-examination, that Mr. Simmons' statement as to the profit which could be made by substituting glazed earthenware for stoneware pipes made a deep impression on his mind, and that he made it the principal point in his indictment of the plaintiffs. Indeed we have been asked to regard his cross-examination as a formal withdrawal of all other charges against the plaintiffs, including those relating to the representation upon which the contract was obtained. He did, indeed, explicitly disclaim charging the plaintiff with influencing individual members of the Corporation by bribery or false representations. This I understand to be what he meant when he says: "I deny I charged them with endeavouring to obtain the contract by false representations, or by bribing members of the Corporation." It would not be reasonable or fair to bind a witness by statements which, if literally understood, are contradicted by the entire course of his conduct, when those statements are made in a cross-examination so rapid that the learned Judge thinks it necessary to note that it was impossible for him to take down the whole of it. But whatever ambiguity might have been caused by the defendant's answers on cross-examination was removed by his re-examination. "As regards the Lord Mayor, by 'deliberate mis-statements,' I meant that the statements had no foundation in fact. It was in my mind that the Lord Mayor was probably imposed on. . . . The Lord Mayor made statements on which the resolution of 7th January was passed." The statement by the Lord Mayor, on which the resolution accepting the plaintiffs' tender was passed, was that the castings for the contract would be done by a Dublin firm.

In stating that the representation on which the Lord Mayor supported the resolution of the 7th January had no foundation in fact, the defendant made it plain that he did not withdraw his charges with regard to the obtaining of the contract, while he repudiated the suggestion that he had charged the plaintiffs with bribery or corruption in regard to individual members of the Corporation. That this was the view of the defendant's evidence taken by the learned Judge appears from

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his refusal to accede to Mr. Ronan's requisition, to which I shall presently refer, in regard to the letter of the 9th March.

The personal matter to which I have referred arose in the following way. The defendant stated at the meeting of the 4th January that he had made inquiries about the shares of the Hammond Lane Foundry, and had found that Alderman Farrell had put down his name for £100 worth of shares. Asked by Alderman Farrell whether he had insinuated that he had put down his name for shares and did not put down his money, the defendant said he would come to that by and by. It was natural that a man holding £100 shares in the foundry should be anxious to get the contract for the proprietors of the foundry. The defendant also said that he found Miss Annie E. Irwin's name down as a shareholder, and it was natural that Alderman Irwin should wish to have the contract placed with Messrs. Crawford & Frame. When this topic was mentioned again by the defendant at the meeting of the 4th March, the following is reported to have occurred: Alderman Farrell referred to proceedings taken against "a gentleman who had made a statement about him," adding that the following day would be the last for filing the defence; whereupon the defendant is reported to have said that he would be very agreeably disappointed if Alderman Farrell would go into the witness-box. Alderman Irwin, who was examined for the plaintiffs, stated that what the defendant said at the meeting conveyed to his mind that he and Alderman Farrell had been bribed by the plaintiffs to support their tender. The mode which they adopted of vindicating their character from a charge which is certainly not suggested by anything which the defendant is reported to have said, was by means of an action of slander, in which the plaintiff was Alderman Farrell, and the defendant Alderman Irwin, who, as he stated in his evidence, had unfortunately repeated in the committee-room what had been stated to him of Alderman Farrell. Alderman Irwin had no hesitation in tendering a full apology, and withdrawing what he had said. This was published on March 23, and the incident terminated. But in the meantime the subject had been again adverted to by the defendant in his speech to the meeting of the 11th March, and I shall have to refer to it when considering the answers of the jury to the questions submitted to them.

The oral defamation complained of in this action was, as I have said, contained in the two speeches made by the defendant at the meetings of the Corporation on the 4th and 11th March. The libels complained of were contained in two letters, that of the 10th of January, addressed to the Local Government Board, and that of the 9th March addressed to the public Press. The learned Judge reports that Mr. Ronan, on behalf of the plaintiffs, admitted that the occasions on which the defendant's speeches of the 4th and 11th March were made were privileged occasions, and that the matters commented upon in the defendant's letters of the 10th January and 9th March were matters of public interest.

Extracts from the speech of the 4th March are set forth in the 4th paragraph of the statement of claim. The 5th paragraph places on these words the innuendo that the words complained of mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors. The innuendo pleaded in the 6th paragraph is that the plaintiffs had been guilty of a criminal offence.

The extracts selected by the plaintiffs are fairly representative of the general character of the speech. The charges complained of by the plaintiffs divide themselves into three heads. 1. Those relating to the drainage pipes. 2. The reference to the alleged bribery or attempted bribery of a member of the Corporation. 3. The reference to the manner in which the plaintiffs had obtained a "premium" of £1251, which the Corporation proposed to pay with the view of encouraging the establishment of a new industry in Dublin.

Questions 1–3 deal with this speech generally. The jury found that the words were spoken, that they related to the profession and business of the plaintiffs, and that they conveyed the meaning attributed to them in the 3rd paragraph of the statement of claim.

The subsequent questions relate to the specific charges which I have enumerated. By their answer the jury acquitted the defendant of having charged the plaintiffs with bribery and corruption in the sense that they had been guilty of a criminal offence, punishable with imprisonment.

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The 5th and 6th questions relate exclusively to the charges about the drainage pipes. To charge contractors with an attempt to substitute different and inferior pipes for those specified and tendered for, is clearly to impute misconduct in the discharge of their business as contractors, and the jury so find. They find for the defendant on the defence that he spoke the words without malice, and in the belief that they were true. The occasion was admittedly privileged.

Mr. Campbell in opening the case said that if there had been no charge but that in reference to the pipes he would not contend that there was not evidence to support the findings of the jury. The case which he presented with so much power was that it was impossible to pick out one or two of the allegations, and to deal with them separately; and I understood him to deal with the evidence as regards the pipes in connexion with the rest of the case. Without in any way binding Mr. Campbell by an admission, I may say that I have heard no argument to satisfy me that the evidence in the case, especially that of Mr. Simmons, is not amply sufficient to support the finding of the jury in favour of the defendant on the 6th question.

Question 6*a* deals with "the words in paragraph 4 complained of, other than the words which refer to the drainage pipes." Special damage not having been pleaded, these spoken words could only be actionable in either of two ways. Either (I adopt the words of the question) (1) as "meaning that the plaintiffs had been guilty of a criminal offence, punishable by imprisonment": this meaning had been negatived by the answer to question 4; or (2) if they should be found to "impute defamatory charges against the plaintiffs in relation to their profession and business as contractors": this meaning is negatived by the answer to question 6*a*.

It is contended that this answer is not only against evidence, but inconsistent with the answer to question 3, and that this inconsistency proves that the jury in so answering acted perversely, or without a proper appreciation of the questions submitted to them.

I agree with the proposition laid down by Mr. Moriarty in his able argument that each group of answers must, in the first

instance at all events, be taken as a whole, in order to arrive at a determination of what was really decided in the case. Applying this principle, and reading the findings of the jury in the light of the evidence at the trial, I find no difficulty in understanding the view of the case which they endeavoured to embody in their answers to the questions relating to the speech of the 4th March. They thought, and rightly, that the subject-matter of the entire speech was the contract, and also the plaintiffs, who appear in this case as contractors; and, accordingly, they answered question 2 in the affirmative. Taking the words complained of as a whole, they thought, and rightly, that they conveyed very grave charges against the plaintiffs, and by their answer to question 3 they adopted the meaning put upon them by the plaintiffs, holding that these words amounted to a charge of fraudulent and dishonest practices and conduct, of bribery and corruption, and of unfitness to be employed as contractors; but by their answer to question 4 they expressed their opinion that the bribery and corruption imputed by the defendant's words were something short of a criminal offence, punishable by imprisonment. I shall presently consider the effect of this qualification of the answer to question 3. They were then required by the judge to separate the words complained of into two parts, and to deal separately with each. They found, and rightly, that the words referring to the drainage pipes were not only spoken of the plaintiffs in relation to their profession and business of contractors —as they had already found of all the words by their answer to question 2—but spoken in a defamatory sense. As to the words complained of other than those referring to the drainage pipes, they find that they did not impute defamatory charges against the plaintiffs in relation to their profession and business.

In answering questions 2, 4, and 6*a* the jury had the assistance of the directions as to law of the learned judge. He made clear to them, I have no doubt, the difference between the questions which he put to them as 2 and 6*a*, and explained to them the kind of spoken statements with regard to men in the position of contractors which would be defamatory and actionable without proof of special damage.

Words to be actionable on the ground of having been spoken

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of a man whose position is the profession or occupation of contractor must be spoken of him in reference to his character or conduct as contractor. An allegation that he is of bad character and guilty of misconduct, even of misconduct which would render him unfit to be employed as a contractor, is not actionable unless the misconduct alleged is in the conduct of his business, or of such a character as would render him unfit to discharge faithfully and correctly the duties of a contractor. The plaintiff in *Lumby* v. *Allday* (1) was clerk of a gas company. The words upon which the action was founded stated that the plaintiff was a fellow, a disgrace to the town, and unfit to hold his situation by reason of his conduct with improper persons. Notwithstanding the specific reference to unfitness for the position held by the plaintiff, these words were held not to be actionable. Bayley, J., says, "Every authority which I have been able to find either shows the want of some general requisite as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." No objection was taken to the directions given by Andrews, J., on this branch of the case.

The answers of the jury to these three questions, fairly interpreted, amount to this. All the words are referable to the contract, and to the plaintiffs in their relation to the contract. Those relating to the pipes are defamatory, inasmuch as they impute want of integrity as contractors. The remainder of the words are not defamatory in the sense explained in the Judge's charge, inasmuch as the misconduct which they impute to the plaintiffs is something quite apart from misconduct in the profession or business of contractors.

In my opinion the jury were fully justified in answering question 6*a* in the negative. I would go further, and say that outside the matter of the pipes I can find nothing in the words complained of in the 4th paragraph, or in any part of the speech of the 4th March, defamatory of the plaintiffs as contractors, or suggesting that they were otherwise than competent and trustworthy in their profession and business. They are indeed accused of having obtained the drainage contract by improper means. This

(1) 1 Cr. & J. 301.

is the meaning of the reference to the "£1250 of premium the corporation proposed to pay with the view of encouraging the establishment of a new industry in Dublin." This his hearers would understand as referring to misleading statements as to the amount of work connected with the contract which would be done in a Dublin foundry. It was to this matter that the defendant referred when he said that "he had been told that day that Alderman Cotton—and it was to his credit—arranged to dissociate himself entirely from this shady and very ugly transaction." This is a matter entirely distinct from allegations of misconduct as contractors in relation to the pipes, or from the vague and shadowy references to bribery, which the jury have interpreted as suggesting something different from a criminal offence. If bribery of this latter kind had been alleged, the slander would have been actionable, not because it was defamatory of the plaintiffs in their business, but as imputing a criminal offence.

To accuse contractors of obtaining a contract by an appeal to patriotic sentiments, based upon representations which have been proved to be untrue, is to bring a serious accusation. But the jury may have fairly considered that contractors who were thoroughly competent and trustworthy in the matter of their business might be tempted to descend to unworthy practices in order to obtain a profitable contract. They appear to have carefully discriminated between charges of misconduct of this kind, and the charges as to the pipes, which were clearly suggestive of want of integrity as contractors, and I see no reason to find fault with their findings on this branch of the case.

Mr. Campbell, in commenting upon the answer to question 6*a* (and his observations are equally applicable to 12*a*), pointed out that the form in which these questions were framed brought it home to the minds of the jury that, if the questions were answered in the affirmative, they would be bound to award some damages to the plaintiff, which he suggests they were determined not to do under any circumstances. The answers to those questions were described by Mr. Ronan as contrary to evidence, and such as no intelligent jury could have given, that is honestly given; and it is mainly from a consideration of those answers that we are

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asked to conclude that the jury acted either perversely or without a proper understanding of the questions submitted to them.

I quite agree that the jury intended that their verdict should be for the defendant. If the case had been presented to them in the form of the general issue, they would have found a verdict of "not guilty." The present practice of submitting separate questions to a jury has many advantages as a means of securing an honest decision in accordance with evidence. But it has the result of subjecting the jury to a kind of cross-examination; and in dealing with their answers as with the evidence of a witness, we must be careful not to attach undue importance to apparent or even to real inconsistencies, as evidence of untrustworthiness or perversity. I have no doubt that the jury when they answered those questions had immediately present to their minds the result of their decision. Even if I did not agree with their judgment, I should hesitate to regard this circumstance as evidence that they acted dishonestly or perversely, provided their answers were such as twelve reasonable men could have given to the question. But I need hardly say that the circumstance has no weight with me, when I should have given the same answers myself.

It was contended, especially by Mr. Ronan, that the direction which the learned Judge incorporated in his question was not only the occasion of misconduct on the part of the jury, but inconsistent with his refusal to withdraw from the jury the defence of fair comment in regard to the letter of March 9. I shall deal with this matter when I come to consider this letter. I pass from it at present with the observation that the answers of the jury to questions 6*a* and 12*a* render it unnecessary to consider the exact meaning and effect of the direction of the Judge, so far as it directly relates to the alleged slanders.

I now proceed to consider the findings of the jury upon the 3rd and 4th questions, those which relate to the meaning to be attributed to the words complained of in the 4th paragraph of the statement of claim. It was no doubt with those findings in his mind that the learned Judge in his report guards himself against saying that he would have answered every question exactly as the jury did.

In putting these questions to the jury, we may be certain that

the Judge gave them a full and clear statement of the law regarding bribery as a criminal offence punishable by imprisonment. It is stated that he read to them the statutes 52 & 53 Vict. c. 59, applicable to offences of the kind; and I must assume that the jury had his exposition of the law present to their minds when they retired to consider their verdict.

By their answer to the 3rd question, they found that the words imputed fraudulent and dishonest practice and conduct, bribery and corruption, and unfitness to be employed as contractors. If the jury had not gone so far as to adopt the words "bribery and corruption," this answer would have presented no difficulty to my mind. I should not have myself selected the remainder of the innuendo as conveying the meaning of the words complained of. At the same time the jury might not unreasonably have interpreted the speech of the defendant as amounting to a charge of obtaining a contract on favourable terms by means of a representation which they knew, or ought to have known, to be unfounded in fact; and I cannot say that they acted unreasonably in adopting the plaintiffs' suggestion that a charge of this character amounted to an allegation of fraudulent and dishonest practices, with the consequence that persons guilty of such practices ought not for this reason to be employed, however eminent and trustworthy they might be in the conduct of their business as contractors.

To have adopted the words "bribery and corruption" as representing the defendant's meaning, and at the same time to have negatived the imputing of a criminal offence, was, I think, a misapplication of the English language, as the words "bribery" and "corruption" are now understood. But I have to consider how far the course of the trial was affected by this phraseological infelicity, or how far it ought to influence our judgment in considering the answers of the jury to the other questions.

The ultimate result would have been the same if the jury had rejected the interpretation put on the defendant's words by the innuendo, and had answered the 3rd question in the negative, for the jury have not found, nor were they asked to find, that the words spoken were true in the sense alleged, or in any other

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sense. Unless, therefore, I can find in the answers to the 3rd and 4th questions such an inconsistency as would lead me to the conclusion that the jury did not understand the questions submitted to them, or acted perversely, no miscarriage has been established, although I should have myself answered one of those questions differently.

The defendant had denounced the acceptance by the Corporation of a tender £1250 in excess of the lowest as a breach of duty to the ratepayer. He had said that the plaintiffs had induced the Corporation to do this wrong, by holding out promises, which they were not able to carry out, of money to be gained, not by the individual members of the Council, or by the Corporation as a body, but by a class in whom they are naturally interested, the workingmen of Dublin. This may have presented itself to the jury as amounting to a charge of bribing and corrupting a public body, which ought to have rejected considerations of this kind; as distinguished from the bribery, properly so-called, of individuals, which amounts to a criminal offence. I should be sorry to lay down for jurors a counsel of perfection in regard to the use of the English language which I might find it difficult always to follow myself; and I can find nothing in the answers to questions 3 and 4 suggesting to my mind that the jury had not a substantial understanding of the issues submitted to them.

Those observations apply equally to the answers of the jury in relation to the speech of the 11th March. The answers to questions 9 and 10 do not prevent the difficulty caused by the adoption of the words "bribery and corruption" in the answer to question 3. But in other respects the questions raised in respect of the slanders complained of are identical.

I now proceed to the consideration of the alleged libels, which I can deal with in fewer words than I have been obliged to employ in discussing the other branch of the case. I postpone for the present the letter of the 10th January, which chronologically, as well as legally, occupies an exceptional position.

The letter of the 9th March appeared in the public Press, in contemplation of the meeting of the Corporation which was to be held on the 11th. A portion only of this letter is set forth in the 12th paragraph of the statement of claim, as follows:—

"The citizens will wait the result of Monday's special meeting with more than ordinary interest. The members of the Council, if there be any, who are willing to champion a job of this kind, should at the first opportunity be turned right-about-face, and receive such a parting kick—I speak metaphorically, of course—as they would feel and remember for the balance of their earthly existence.—Yours truly,

"FRANCIS VANCE.

"P.S.—At Monday's special meeting, when the Town Clerk has read the letter addressed to him by Messrs. Crawford & Frame—a copy of which appears in to-day's *Express*—I will effectively dispose of its contents."

This part of the letter cannot be understood without reading the entire. It was written after the Corporation had passed a resolution putting a stay on the completion of the contract, pending a report from the city surveyor as to the amount of ironwork which could be done in the Dublin foundry. The writer begins by quoting from the Lord Mayor's speech on the 7th January and his letter of the 17th of January, to which I have already referred. He goes on to say that he does not see "how any member of the Council can by any possibility do otherwise than vote for the rescinding of the resolution on which Crawford & Frame's tender was accepted—accepted because of the statements made by the Lord Mayor, not one of which has any foundation in fact." Here is the point of the letter—the statement which the Lord Mayor was misled into innocently making, to the effect that the ironwork would be done in Dublin, had no foundation in fact. This was proved beyond doubt at the special meeting summoned for the 11th, to which the writer looks forward. It is to the action which would be taken by the members of the Council at that meeting that he thus refers. I cannot say that the jury acted unreasonably in holding that the words complained of did mean that the plaintiffs' contract with the Corporation was a job, so corrupt and disgraceful that every member of the Corporation who voted for it should be driven from office and from public life, and that the plaintiffs' letter in reference to the contract was a misleading and untrustworthy document; nor do I see why such an interpretation of his words should be disclaimed by the defendant. The voting referred to was to take place at the meeting of the 11th, when the exact state of facts would be made known

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to the members of the committee. If at that meeting, and with the knowledge of the facts—and that was the kind of voting referred to—a member of the Corporation knowingly recorded his vote for a contract so obtained, he might be described as deserving the treatment indicated. It is at all events true that no member of the Corporation cared to run the risk, for the resolution of the 7th January was rescinded without a division. It was, in my opinion, quite open to the jury to adopt the construction put upon this letter by the plaintiffs as the natural and ordinary signification of the words, and to find that so far as they consist of allegations of fact this was true in substance and fact. Was it a fact that the plaintiffs had been guilty of a job—of a corrupt and disgraceful job? I say no more than that this was a question for the jury.

I have not overlooked the circumstance that the defendant has not justified those words in the sense attributed to them by the innuendo. But in the view which I take of these findings this circumstance is immaterial.

With regard to the plea of fair comment, the matter referred to was admittedly of public interest. The test thus laid down by Lord Atkinson seems to be precisely applicable to this case:—"A personal attack may form part of a fair comment upon given facts, truly stated, if it be warranted by those facts: in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts, is a matter of law, for the determination of the Judge before whom the case is tried; but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether, in that particular case, it ought to be drawn": *Dakhyl* v. *Labouchere* (1).

Mr. Ronan asked the Judge to direct the jury, as to both libels, that, upon the defendant's admission, no such defence was open; and he contended that the refusal to direct was inconsistent with the direction embodied in questions 6*a* and 12*a*. I have already given my reasons for thinking that the defendant's admissions did not apply to the means by which the contract was obtained. As regards the supposed inconsistency, it must be

(1) 23 T. L. R. 364.

observed that the direction in questions 6*a* and 12*a* was obviously given on the assumption that the preceding questions had been answered in favour of the plaintiffs. If this were so as to all these questions, there were undoubtedly portions of the slanders to which the admissions did apply, and which were therefore not covered by the plea of fair comment. However that may be (and the question is only of academic interest), I am clearly of opinion that the question of fair comment was properly submitted to the jury, and that their finding is fully justified by the evidence.

The letter complained of in the 10th paragraph was written to the Local Government Board on the 10th January. At that time the only thing complained of by the defendant was the acceptance of a higher tender with a view to foster a local industry. None of the topics subsequently introduced into the case was, or could have been, present to the minds of the writer or of the Local Government Board. The letter complains of the action, not of the plaintiffs, but of the Local Government Board. The Lord Mayor had referred to the sympathetic reception by the Board of the suggestion that the plaintiffs' tender, though not the lower, should be accepted. I have already referred to the disclaimer by the Board of this supposed sympathy. The writer suggests that the reference made at the meeting of the 7th January to the attitude of the Board had an effect in inducing the Council, "by a large majority, to adopt the report, the result of which is to put a tax of £1250 on the already sorely burdened ratepayers." The remainder of the letter is a suggestion that encouragement given by the Board to deviate from what the writer regards as the proper rule of conduct as regards the tenders would have the effect of broadening, instead of narrowing, the way that leads to corruption. I am at a loss to see how these general remarks could possibly be read as defamatory of the plaintiffs, or in any way reflecting on the subsequently discovered facts relating to the manner in which the acceptance of this particular tender was brought about. I think the jury were mistaken in their answer to the 15th question, and I believe that the mistake was occasioned by their not bearing in mind the date at which this letter was written, and by reading into it a reference to matters which subsequently came to light, in reference to the obtaining of the contract. But I see no reason to

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suppose that this mistake was other than an honest one, not unnatural having regard to the complication of the case. The letter was left to them as capable of being understood in some defamatory sense. If the case were to go to a second trial on this letter, the result would not be altered if I am right in holding that the letter is incapable of being read in a sense defamatory of the plaintiffs. The words of Lord Esher, M.R., in *Merivale* v. *Carson* (1), are here in point:—"Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed." The jury were fully justified in finding the words true in their natural and ordinary signification. They have not justified them, nor were they asked to justify them, in the defamatory sense imputed to them by the innuendo. The findings in regard to this part of the case are, no doubt, unsatisfactory. But they do not suggest to my mind perverseness on the part of the jury, or misunderstanding of the other issues in the case, or afford a reason why we should send to a new trial this cause of action, when I am clearly of opinion that the result would be a direction in favour of the defendant.

After a careful examination of the evidence in this case, I have the satisfaction of finding myself in accord with the learned Judge who tried it. There are some questions which I should have answered differently from the jury; but this is not sufficient to lead me to send the case to a new trial. I have examined these questions and the answers of the jury, to ascertain as best I could their effect on the course of the trial, and its result. So far as regards the result, it would have been precisely the same if these questions had been differently answered. But that is not enough. If I had concluded from the answers to these questions, taken separately or in connexion with the answers given to other questions, that the jury had acted perversely, or without a due appreciation of the evidence or of the meaning of the questions, I should have regarded the result as a miscarriage, which would have necessitated a re-trial of the entire action.

(1) 20 Q. B. D. 275.

For the reasons which I have already stated at a length which can only be justified by the importance of the case, I have not come to this conclusion; and I am fortified in my view of the action of the jury by the concluding words of the report of my brother Andrews:—

> "I saw nothing in the patient conduct of the jury throughout the prolonged trial which could be in any way justly described as perverse; and they appeared to me to adequately understand the two charges of slander and the two charges of libel made by the plaintiffs, and complained of in the statement of claim, and also the questions sent to them. Without saying that I would have answered every question exactly as the jury did, I thought the findings, having regard to my charge, were for them, and I think they understood my charge."

GIBSON, J.:—

The claim represents four distinct causes of action:—(1) A letter to the Local Government Board dated 10th January, 1907, sent to the Press for publication on the 19th January; (2) a speech at a Council meeting on the 4th March; (3) a letter published in the Press on the 9th March; and (4) a speech at a special meeting on the 11th March. In dealing with the case it is essential to observe the sequence of events. Unfortunately in the pleading the order of time was disregarded, the oral speeches being stated in the 4th and 7th paragraphs of the claim, and the letters come after in paragraphs 10 and 12. The questions to the jury followed the same arrangement. The innuendo findings may have been influenced by this.

The speech of the 4th March is pleaded with two special innuendoes, paragraph 5 alleging the meaning to be that the plaintiffs had been guilty of fraudulent and dishonest practices, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors; paragraph 6 representing the meaning to be that the plaintiffs had been guilty of a criminal offence punishable by imprisonment.

The speech of the 11th March is also laid with two special innuendoes, paragraph 8 corresponding with paragraph 5, but with the material difference that it is silent as to bribery and corruption; paragraph 9 corresponds with paragraph 6, but adds bribery and corruption.

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The letter of the 10th January, printed on the 19th January, has attached thereto a special innuendo that the plaintiffs were guilty of corruption (it does not allege bribery) and dishonesty in their efforts to procure a contract with the Corporation.

The letter of the 9th March is also the subject of a special innuendo that the plaintiffs' contract with the Corporation was a corrupt and disgraceful job, and that the plaintiffs' letter in reference to the said contract was misleading and untrustworthy.

There is no innuendo attached to the libels that the plaintiffs were guilty of bribery or any criminal offence. The pleading does not rely on any special damage, which, in case of the slanders, might give a substantive cause of action.

The crime referred to in paragraphs 6 and 9 is that created by 52 & 53 Vict. c. 69, sect. 1. There was some discussion as to the meaning of "corrupt" in the innuendoes. The word does not necessarily connote bribery or illicit pecuniary or other advantage—but the point here is what does it import in the innuendoes? How was it understood by the jury?

The defences to the alleged slanders and libels are on different lines. There are traverses in each case, but in the case of the slanders the special defence is privileged communication only; there is no justification. With regard to the libels, there are three special defences: (1) a defence of quasi-privileged communication, founded on authorities such as *O'Donoghue* v. *Hussey* (1); (2) fair comment; (3) justification in the natural meaning of the words without the innuendoes.

With regard to the speech of the 4th March, the jury found that the words related to the business of the plaintiffs as contractors; they found the whole innuendo changed by paragraph 5, but negatived the innuendo in paragraph 6 imputing crime; that the words relating to drainage pipes related to plaintiffs' business as contractors, and had a defamatory sense; that these words were spoken without malice in the belief that they were true; and that the other words did not impute defamatory charges in relation to plaintiffs' business.

The findings on the speech of the 11th March are somewhat

(1) I. R. 5 C. L. 124.

similar, but paragraph 8 (which the jury found in favour of the plaintiffs) did not aver bribery and corruption, and the entire of paragraph 9 (which did aver bribery and corruption) was negatived.

As to the letter of the 10th January, the jury found the special innuendo; that it was not a libel; that it was written without malice, and in the belief that it was true, and was a fair and *bona fide* comment; and that the words were true according to their natural and ordinary meaning.

There were similar answers as to the letter of the 9th March. The finding "no libel" must, from the innuendo found, mean that the publication was excused. There was no question put on the special defence of quasi-privilege (founded on *O'Donoghue* v. *Hussey* (1)), which was treated as unsustainable.

There was no objection to the questions (which, indeed, were in substance those proposed by counsel); nor, when the jury gave their answers, was there any objection that there was any repugnancy or uncertainty disclosed by the findings. The Judge directed the jury—without objection—that as to defamatory imputations upon the plaintiffs in relation to their business (apart from the pipe question) there would be no defence of privilege, and he inserted this direction among the questions left to the jury. Plaintiffs' counsel asked for a direction on the defence of privilege—save in reference to the pipes—on the ground that there was no evidence that defendant believed the words to be true, and, on his own admission, did not believe them to be true, and had no evidence to justify them, and as to the defence of fair comment, pleaded in answer to the libel, that there was no evidence to sustain it, and upon defendant's own admission, no such defence was open.

Before us the plaintiffs' main argument was that the findings were repugnant and unintelligible, so far as they related to defamatory matter not connected with the pipes. There were two separate species of imputation. The first referred to the procurement of the contract; the second dealt with the attempt to pass inferior cheap glazed pipes as "best stoneware," which the specification required to be supplied. The

(1) I. R. 5 C. L. 124.

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distinction was rather obscured by the disregard of historical order in the pleading and order of the questions; and in discussing the case it is important to bear in mind the special innuendoes in relation to the different causes of action found by the jury, if they were properly so found. With regard to the libels, plaintiffs' counsel contended that the finding of justification could not possibly stand; that it was without evidence, and that when the innuendo was found in favour of the plaintiffs, the defence ceased to have any intelligible operation. They also argued that the special defences were not, on the evidence, available.

A brief outline of the nature of the case will explain my view and the reasons of my conclusion.

The dispute arose out of the Clontarf drainage scheme. In 1906 the tender of a Kilkenny contractor, Kelly, was accepted, but fell through in consequence of the inability of Kelly to get security. He had sought the aid of the plaintiff Crawford, but the latter, after a visit to Dublin, declined to assist him. On the 8th December, 1906, new tenders were advertised for, and Crawford arranged with Frame to tender as joint contractors. He came to Dublin on the 27th December, and the same day lodged a tender for £47,593, with specification. The shortness of the time and the character of the specification were relied on by defendant's counsel as indicating secret assistance. Frame had a small foundry at Hammond Lane, Dublin, which in October previously he had turned into a limited company. 100 shares of £1 each in this were at that time allotted to and held by Alderman Farrell, a member of the Corporation, and fifty shares were held by Miss Irwin, sister of Mr. Irwin, also in the Corporation. The lowest tender was that of Binns, an English contractor, for £46,342. He had previously tendered in competition with Kelly, and on that occasion serious errors had been discovered in his figures, as appears from Mr. Harty's report on August 28. This did not form any part of the reasons for rejecting Binns' present tender.

On the 31st December Mr. Harty sent in his report on the new tenders, and on the same day the plaintiffs saw the Lord Mayor (Mr. Nannetti) and some other members of the Improvements Committee, and gave certain assurances as to portion of the iron

work being done in Dublin at the Hammond Lane Foundry. These assurances were, according to plaintiffs' letter of the 2nd of January, confined to manholes and special castings, and to an undertaking to employ none but Dublin labour (except about six foremen). The Lord Mayor understood the representations in a more extended sense—a view supported by plaintiffs' letter of the 5th February. The Lord Mayor waited on the Local Government Board to guard against risk of surcharge if the lowest tender was rejected, and got a sympathetic reception, of which he adopted an unduly favourable estimate, as his speech on the 7th January, read in connexion with the Local Government Board letter of 15th January, shows. At the meeting of the Corporation on the 7th January the report of the Committee recommending the plaintiffs' tender was adopted, notwithstanding the active resistance of defendant, who considered that the acceptance of the higher tender was unjustified. The Lord Mayor spoke in support of the report. The newspaper accounts do not quite agree. I refer to separate extracts which are probably correct. According to the *Irish Times* he said that for reasons which it was not politic to mention, but which could be ascertained from the Committee, it was considered better to give the contract to an Irish firm, getting a guarantee that the work was to be executed by Irish labour. In the *Freeman* he observed that the Local Government Board met them sympathetically, and said they had made out a good case for accepting the plaintiffs' contract. Later on he added that the city engineer recommended it. This would seem to have been a mistake on the speaker's part. Mr. Vance spoke of Tammany, repudiated the alleged action of the Local Government Board, and said he would challenge the matter on audit. On the 10th January he wrote to the Local Government Board the letter constituting the first libel. So far as this publication was concerned, the occasion was plainly privileged, and I hardly see how the letter could be understood by the recipients in the sense of the innuendo. It was, however, sent to the Press by the defendant on the 19th, and this publication, plaintiffs' counsel contend, having regard to the language used by the defendant on the 7th January, might be understood as imputing corruption and dishonesty to the plaintiffs. In the question to the jury there is no reference to the

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printed publication—I suppose from oversight. The reply of the Local Government Board on the 15th January, states that the Lord Mayor had been informed that the Board's sanction was not necessary, and that though the Corporation was not bound to accept the lowest or any tender, they should be prepared to satisfy the auditor that it was a reasonable exercise of discretion, and that they had acted in good faith. On the 16th January defendant wrote to Tobin, the secretary, for the undisclosed reasons referred to by the Lord Mayor on the 7th, and on the 17th got a reply that there was no information in Tobin's possession beyond what was officially recorded in the report. On the same day the Lord Mayor wrote to defendant, repeating the statement that all the pipes were to be manufactured in this country at the plaintiffs' foundry. At the trial the Lord Mayor stated that the secret reason for rejecting Binns' tender was that Chatterton was of opinion that the work could not be done for the money. Of this reason I cannot find any previous trace. On the 17th January, 1907, defendant wrote a letter of caution and protest against sealing the contract. On the 19th the defendant's letter to the Local Government Board of the 10th was printed and published.

Up to this stage the only subject of defendant's complaint was the acceptance of the higher tender; and the defendant's blame was directed against the Council, not against the plaintiffs. There was no suggestion of bribery; and the pipes controversy did not exist. The defendant was quite entitled to express his opinion as to the acceptance of the lower tender, and he had reason to believe that the Lord Mayor's speech was inaccurate as to the secret reasons, and the borough surveyor's alleged recommendation (which had not been given) as well as to the description of the Local Government Board interview. These matters were present to his mind when he sent his letter of the 10th to the Press on the 19th.

On the 4th February it was resolved that the seal should be withheld till they received the borough surveyor's report whether the entire iron-work could be cast in the Hammond Lane foundry. It was at this meeting the charge of bribery originated, Councillor Daly stating that he had been told by an Alderman that Mr. Frame

had given Alderman Farrell fifty shares for his support of the contract. Alderman Kelly had heard this from Alderman Irwin, and stated he was the Alderman referred to by Daly. During the discussion (probably before this unpleasant charge) defendant made a speech that the contract was carried by misrepresentations, first, as to the existence of undisclosed reasons—there being none such; and secondly, as to the borough surveyor's recommendation of the plaintiff's tender—there being no such recommendation. He then observed that Alderman Farrell had £100 worth of shares, and would naturally get the contract for the foundry; and that Miss Irwin's name was also down as shareholder, and Alderman Irwin would naturally wish to have the contract placed with the plaintiffs. It was at the close of the discussion that the resolution not to attach the seal was passed. Defendant was in my judgment entitled then, and subsequently, to comment adversely on a member of the Corporation being interested in the acceptance of a tender.

Pursuant to the last resolution, on February 14th Mr. Harty forwarded his report, stating that £2062 3*s*. represented iron-work which could be done in Dublin; and that as to £1500 (for ejector castings), Chatterton (whose letters were attached) was of opinion that plaintiffs could not make them. He called attention to the apparent discrepancy between plaintiffs' letter of the 2nd January and their letter of the 5th February to Harty (as to iron-work), which corresponds with the Lord Mayor's original representation. This letter of the 5th February for the first time refers to the stoneware pipes which formed the main or sole ground at the trial for impugning the plaintiffs' honesty. It does not refer to extra-glazed pipes being used instead.

Immediately after the January meeting, Vance commenced communications with Binns and Kelly. The letters show that he was anxious to support Binns if his tender was free from objection; they do not indicate want of good faith or any corrupt or illegitimate motive.

The meeting of the 4th March was the occasion of the most serious of the defamatory charges. There were two grounds of attack. The first was that plaintiffs were attempting to substitute for best stoneware pipes earthenware pipes of inferior quality,

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which would cost £2000 less. The second was bribery in the inception of the contract.

As to the pipe question, Mr. Campbell, K.C., admitted (I think rightly) that there was evidence on which a jury might act, and that if the case turned on that point alone, it might be difficult to upset the verdict. I do not discuss the evidence in detail. It is enough to say that Brown, the Scotch manufacturer, had, as their best stoneware, a pipe much more expensive than extra-glazed fire-clay pipes, which latter article they were supplying in Ireland. Kelly arranged with them that they were to supply extra-glazed fire-clay pipes, if they would pass Harty; and later on, the plaintiffs contemplated the same method of performance. The plaintiffs alleged that certain quotations from other manufacturers, none of whom was examined, showed that best stoneware was not dearer than extra-glazed. On the other hand, Simmons, Brown's representative, alleged that there were different qualities of stoneware; and, unquestionably, on the evidence present to defendant's mind—Simmons' statement (which was noted by Vance, and shown to counsel at the trial, though we did not see it)—Brown's best stoneware was much dearer. There was no satisfactory independent evidence on either side, and the statements of the plaintiffs are not quite consistent. Defendant's counsel attached much importance to the alteration of one of the documents produced by the plaintiffs; but this change may have been the result of confusion or mistake. Mr. Campbell said that defendant (when he made his speech) was aware of Kelly's arrangement for the supply of similar pipes, and that his silence as to this was evidence of bad faith. I doubt this interpretation of the evidence. The speech on this point of the pipes may have been in somewhat exaggerated language, but there was certainly a jury question; and if the decision of the case depended on the pipe controversy alone, there would be no case made out for a new trial.

The second head of attack was the charge of bribery arising out of the transaction of the 4th February. It appears that a writ was issued on the 5th February by Farrell; an appearance entered on the 12th February; statement of claim delivered on the 22nd; the day after the speech, the 5th March, a consent was entered into; and on the 23rd March an apology was published.

In reference to bribery and corruption, defendant in cross-examination disclaimed any intention of making any such charge, meaning, I suppose, that he only repeated (without adopting) an imputation which, publicly made, ought to be investigated and refuted, if false. The jury, however, have found that the words used bore the meaning alleged in paragraph 5 of the claim; and as defendant admitted he had no materials for any such imputation, he could only rely on a denial that the words applied to the plaintiffs as contractors, and that they imputed a crime.

If the case should go to a new trial, I wish to guard myself in reference to the direction given by the learned Judge at 6*b* and 12*b*, to the effect that, if the words complained of imputed defamatory charges outside the pipes in relation to plaintiffs' business, the defence failed. There was no exception to this ruling.

I am not satisfied that the defendant's answers in cross-examination were not strained beyond their true meaning. The defendant was entitled to call attention to the public aspersion on plaintiffs' conduct, highly defamatory though it may have been, as demanding investigation, without making himself responsible for such charge or pledging his belief as to its truth. The occasion was privileged; and the privilege was not abused, if he believed honestly that the charge made by another member should be met and cleared. For this reason I do not think that the plaintiffs were entitled to such a direction as they asked at the close of the case. The learned Judge's direction was conditional. If it means that the defence would fail if defendant's language imputed a personal affirmative charge made by defendant himself, it would be free from objection, as defendant intended (he admits) to make no such charge, and had no independent belief in its truth. If it had a more extended meaning, I would not, for the reasons already mentioned, be prepared to assent to it. The direction does not refer to the innuendoes (which had not been then found), and if the defendant's frame of mind was that, without believing or disbelieving the charge, he thought the matter was material and might be true, and such as to require an answer, his privilege would not be affected by the circumstance that the matter was defamatory of the plaintiffs in reference to their business,

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unless he went further and conveyed that the imputation was true. The meaning was a jury question; the jury having apparently found the innuendo, the defence of privilege would appear to fail so far as relates to bribery and corruption, and the defendant is confined to traverses on that part of the complaint.

The libel of the 9th March (the third cause of action) has for its immediate antecedent a letter from plaintiffs, of 8th March, to the Town Clerk, vindicating themselves as to the pipes, and also in reference to the imputation of bribery and corruption. Defendant's letter of the 9th March, in its postscript, which is unfortunately loose in its wording, says he will effectively dispose of its contents. The jury have accepted the innuendo attached to this letter.

The fourth cause of action was the speech made at the meeting on the 11th, which I do not examine in detail. It was made on a privileged occasion; the jury have negatived that it imputed bribery or crime; and the innuendo accepted by the jury may be understood as referring to the pipe controversy. Ultimately the contract was given to Binns, who employed Kelly as local manager. The plaintiffs brought a specific performance suit subsequently. Having briefly sketched the history of the case, I have now to decide as to each of the causes of the action in detail.

As to the letter of the 10th January, written to the Local Government Board, it was certainly in its obvious and natural sense privileged, although the printed letter addressed to the public could only be protected (if at all) as fair comment. The difficulty is caused by the innuendo, which, in case at least of the original letter as distinguished from the print, may possibly go beyond the fair meaning of the language. No direction, however, was asked as to this. The jury have found that the letter bore the innuendo meaning, and at the same time that it was true in its ordinary and natural signification. What does this mean? The justification was framed so as to avoid having to prove the truth of the innuendo charge. If the finding means that the innuendo charge was true, this would be contrary to the intention of the plea, and there would be no evidence to support such justification. If the finding has not that construction, what is its effect? No authority was cited or example where a jury accepted the innuendo

as representing the true meaning, and at the same time found the limited justification to be true. The pipe controversy does not enter into this first letter.

As to the defence of fair comment pleaded to the libels, it occurs to me that the learned Judge's ruling on the privilege pleas (limiting them to the pipes) must equally apply to fair comment; and, having regard to the innuendo found by the jury, and defendant's admission (as construed by the Judge), that defence was not available. Fair comment is a species of privilege: *Thomas* v. *Bradbury* (1); malice destroys it; and want of *bona fide* belief would seem equally fatal. In ordinary privileged communications, where the occasion is privileged, the onus of disproving belief lies on the plaintiff, if he disputes such belief: *Jenoure* v. *Delmege* (2). Assuming (what I do not decide) that the same principle applies to fair comment (as to which a defendant may get a direction: *Henwood* v. *Harrison* (3)), the defendant's admission, as construed at the trial, is proof of such absence of belief, so far as regards the innuendo. I have felt much doubt about this innuendo; but I am bound by the course of the trial. At a new trial the Judge will be free to act on his own view.

The defence of fair comment may be open to another objection, based on the recent case of *Hunt* v. *The "Star" Newspaper Co.* (4), following *Dakhyl* v. *Labouchere* (5). To support fair comment, Fletcher-Moulton, L.J., lays down—(1) the comment must appear as comment; (2) the facts must be truly stated; (3) the defamatory comments must be reasonably supported by the facts. Here the innuendo (if properly found) is in excess of anything which the facts stated would justify. There is always a difficulty in fair comment where an innuendo imputing an affirmative substantive charge is found; though, of course, fair comment does not cover the same ground as a plea of justification: *Digby* v. *Financial News* (6). The letter of the 10th January does not and could not refer to the pipes; it relates to the genesis of the contract.

As to the speech of the 4th March, the findings seem to me

(1) [1906] 2 K. B. 627.
(2) [1891] A. C. at p. 79.
(3) L. R. 7 C. P. 606.
(4) 24 T. L. R. 452.
(5) 23 T. L. R. 364.
(6) [1907] 1 K. B. at pp. 507–8.

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decisive, that the words (with the meaning in paragraph 5 they were found to bear) must apply to the plaintiffs as contractors; they also seem to impute a criminal offence. The negative answers are inconsistent and irreconcilable. It is impossible to say which findings are to be disregarded and which are to prevail. They cannot all stand. I cannot harmonize them by any process of reasonable construction. The innuendo cannot be restricted to the pipes.

There may be cases where a general finding is limited by a subsequent finding. *Fulton* v. *Andrew* (1) illustrates this. Here such a construction is excluded, as the bribery charged relates to the acceptance of the tender, and has not any connexion with the pipes.

With regard to such cases as *Lumby* v. *Allday* (2) and *Brayne* v. *Cooper* (3) (the latter a curious decision), which lay down that a charge of sexual immorality against a trader does not relate to him in his business, it is obvious that such a charge might affect a particular kind of professional man, such as a gynæcologist. An imputation on integrity or honesty against a person holding an office is actionable: *Booth* v. *Arnold* (4). I cannot conceive that a charge against contractors, that they procured, or sought to procure, the acceptance of a tender by bribery and corruption, does not touch and affect them in their business character (see Odgers, p. 69, and pp. 50–53). Though paragraph 5 might not be sufficient as an indictment, I think, in a civil cause, a jury who found that the charge of bribery and corruption was true, could not reasonably escape the duty of saying that a crime was imputed.

My remarks on the letter of the 10th January apply, more or less, to the letter of the 9th March, where the innuendo is not so forced. It refers to plaintiffs' letter of the 8th March (which dealt, as one of its topics, with the charge of bribery); and the postscript is awkwardly phrased. Probably the writer did not intend any such imputation; but what the letter meant was for the jury, if the document was capable of the interpretation. Here, again, the justification is found to be true In what sense?—the

(1) L. R. 7 H. L. 448.
(2) 1 C. & J. 301.
(3) 5 M. & W. 249.
(4) [1895] 1 Q. B. at p. 576.

innuendo sense (accepted by the jury as true) or some other? If the innuendo imputes corruption (outside the pipe question), there is no proof of such charge. With regard to fair comment, looking at the innuendo, it seems to me difficult to support such defence.

The weakest part of plaintiffs' attack on the verdict relates to the speech of the 11th March, as the innuendo of bribery and corruption and crime was rejected, and the innuendo found might be limited to the pipes. Here the findings are not necessarily inconsistent. The awkwardness arises from the cumbrous innuendoes and the form of the questions. The answer 12*a* negatived a composite question, and probably means that the only defamatory matter was in relation to the pipes. If this cause of action stood alone, I would hesitate to interfere with the verdict.

The findings on the other causes of action seem so contradictory and uncertain that a new trial cannot be avoided; and I think the most convenient and fair course is to remit the whole controversy for further investigation, giving the costs of this argument (as in *Hunt's Case* (1)) and of the former trial to the party ultimately successful.

It is unfortunate that when the answers were returned no objection or question was raised as to their real or apparent inconsistency. The Judge was given no opportunity of considering the difficulties so elaborately discussed before us, or of seeing whether any apparent conflict could be explained and removed. I have come to my conclusion with some hesitation, as the verdict, after a full and careful trial, has the approval of my brother Andrews, is supported by the weighty judgments of my colleagues, and it is important that fearless and searching criticism of municipal administration should not be fettered by undue application of technicalities. The jury (upon whom I make no reflection) obviously considered that Mr. Vance was actuated only by a sense of public duty, and had materials which broadly justified his action.

Much of the difficulty that has arisen has been caused by disregard of time sequence, putting the 4th March speech first, and the multiplication of minor subjects of complaint with complicated

(1) 24 T. L. R. 452.

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innuendoes. The substantial cause of action was what defendant said at the meeting of the 4th March, on a privileged occasion. Should the action have to be tried again, I trust that special care will be taken in dealing with the complicated and embarrassing composite innuendoes, and in distinguishing between matters relating to the procuring of the contract and those conversant with its execution—the pipe controversy.

LORD O'BRIEN, L.C.J.:—

It is my wish that I could agree with both my learned brethren, because their analysis of the evidence has been so admirable that it relieves me of the necessity of going into it. I do not think that anything could be more accurate, and at the same time more compendious, than my brother Madden's analysis of the evidence. My brother Gibson also went through it at great length; and it is wholly unnecessary for me to examine it in detail again. Now I proceed at once to what I conceive to be the heart of the controversy—the forensic controversy—before us, because as my brother Madden and my brother Gibson stated, and as Mr. Ronan said in reply to me, the real ground of impeachment of the verdict was that the findings of the jury were wholly inconsistent and irreconcilable, so inconsistent and irreconcilable that the verdict should be set aside. Now let me see what was said by the learned Judge who tried the case, one of the most careful Judges that ever sat on the Bench in this country—my brother Andrews. It is to be remembered that there was no objection taken to his charge for misdirection or non-direction; that the questions were written out; and that when the jury came in with their verdict, there was no controversy as to the findings. My brethren will excuse me for reading again what my brother Andrews says—

> "I charged the jury, and sent them the questions set forth in the commencement of this report, to each of which I called their attention. I also called their attention carefully to the defendant's speeches of the 4th and 11th of March, and to his letters of the 10th of January and the 9th of March, and to the evidence bearing upon them; and I explained to the jury what slander was, and what libel was, and also what constituted 'privileged occasion' and 'fair comment,' respectively.

> In order to assist the jury, I also sent them, without objection, the documents comprised in the bundle which I send herewith."

It is not to be overlooked that amongst the documents that he sent to the jury was a copy of the statement of claim. I will hand this to our reporter, that it may be preserved. It has a note on it, in my brother Andrews' writing, that he handed it to the jury. This is most important, especially with reference to the first libel, because what appears in the statement of claim is a truncated version of the first libel. I do not make any reflection upon the learned counsel who settled the pleadings—they know me too well to think that I would do anything of the kind. I do not use the expression "garbled version"; but it is important to show that what appeared in the statement of claim was a truncated extract from the so-called first libel. One of the grounds mentioned in the notice of motion was the charge of perverseness on the part of the jury. In order to make my judgment read consecutively and clearly, it is requisite to read what the learned Judge says about that. Here it is:—

> "I saw nothing in the patient conduct of the jury throughout the prolonged trial which could be in any way justly described as perverse; and they appeared to me to adequately understand the two charges of slander and the two charges of libel made by the plaintiffs, and complained of in the statement of claim, and also the questions sent to them. Without saying that I would have answered every question exactly as the jury did, I thought the findings, having regard to my charge, were for them, and I think they understood my charge."

This is the statement of the very careful Judge who tried the case. Indeed, the vehemence with which the jury was assailed came upon me entirely by surprise, as a county of Dublin jury is always regarded as a careful and impartial tribunal. One passage more in the learned Judge's report:—

> "The questions to be submitted to the jury were referred to and considered generally; and, before the 5th November, I was sent a copy of the questions to be submitted to the jury, as proposed on behalf of the plaintiffs. These I somewhat abbreviated without objection."

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This is vital when you come to consider the case—

> "And I framed questions 6*a* and 6*b*, and 12*a* and 12*b*, in compliance with Mr. Ronan's requisition."

Lord O'Brien, L.C.J.

This requisition is a proof, as I think will appear, of the dexterous and most skilful advocacy had recourse to. Having said so much by way of preliminary observation, let me now come to the findings. Let me take the answers that have been vehemently assailed as being manifestly inconsistent. The first ground of alleged inconsistency is that answers 4 and 6*a* are inconsistent with answer 3—inconsistent to such an extent as to make it imperatively necessary to set aside the verdict. I do not think so. What was question 3, which was answered in the affirmative? It is as follows:—

> "Did the said words mean that the plaintiff had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors? *Answer*—Yes.

In my opinion it is plain, having regard to the answers to questions 4 and 6*a*, that the answer "Yes" to question 3 did not mean to affirm that the defendant imputed bribery and corruption to the plaintiffs in the sense that they were guilty of the legal offence of bribery. This is plainly negatived by the answer to the 4th question, which was directed to the self-same language as No. 3 was directed to. It is essentially necessary to group and put in juxtaposition questions and answers 3, 4, 5, and 6*a*. And it must be borne in mind that the Judge dealt elaborately, as was stated by Mr. Campbell, with what was bribery by statute and at Common Law. He read the statute to the jury, and explained what was meant by bribery at Common Law. This is the language of counsel twice repeated. The answer of the jury to question No. 3 meant that fraudulent and dishonest practices, and bribery and corruption in the sense of having held out false inducements and of having made false pretences as to ability to do in Dublin the entire work, were imputed, but not bribery and corruption in the strict legal sense of these terms. The answer, "Yes" to question 3 was in my

opinion conversant exclusively with the conduct of the plaintiffs with reference to the drainage pipes. This necessarily follows from grouping and collating questions 3, 4, 5, and 6*a* with the answers to them respectively. In fact, what was defamatory within the legal acceptation of the term and in relation to the business of the plaintiffs was what was spoken with reference to the drainage pipes and nothing else. This view renders the answers to 3, 4, 5, and 6*a* consistent. We should, I think, be astute to render the findings consistent; but without having recourse in any way to astuteness, this seems to be a reasonable explanation of what was meant by the answers to questions 3, 4, 5, and 6*a*. As to questions 6*a* and 6*b*, and 12*a* and 12*b*, it is very necessary to bear in mind what took place with reference to them. The learned Judge tells in the passage of his charge which I have already read that he framed questions 6*a* and 6*b*, and 12*a* and 12*b*, in compliance with Mr. Ronan's requisition.

It is quite plain that counsel for the plaintiffs were anxious to get a finding that the language in the speech of the 4th March, other than that which referred to the pipes, was defamatory; but though they submitted the questions with much precision, they did not get the answers they desired. Nothing could be more precise than the question in 6*a*, and no language could fix the jury's attention more closely on the point. It was the point of all others that was exhaustively defined. The attention of the jury, at the request of the plaintiffs' counsel, was focussed upon question 6*a*, and certainly I think we should not set aside this question and the finding in reference to it, because it might be argued that the answer to the third question is inconsistent with it, though, in my opinion, it is not, for the reasons I have mentioned, necessarily so. But, putting questions 5 and 6*a*, and the answers to them, in juxtaposition, is it not at once apparent what the jury meant to find was defamatory, and what they thought was not defamatory in the strictly legal sense? The process of discrimination was carefully pursued. The jury found that what was said as to the pipes was defamatory, and found question 6, the question as regards privileged communication, in the affirmative, thus establishing the defendant's defence to what they found was defamatory. In their discriminating process they answered 6*a* in the negative; and,

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having given a negative answer to 6*a*, they rightly did not apply themselves to 6*b*.

Counsel for the plaintiffs rightly struggled *totis viribus* to get something other than the reference to the pipes found to be defamatory, because it was plain that there was a clear answer in point of law and in point of fact as to what was said about the pipes. There could and can be no question about the propriety of the defence established by the affirmative answer to the 6th question. Mr. Ronan, in his energetic speech, criticized 6*b* and 12*b* as danger signals, warning the jury what might prove a danger to the defendant; but I think it is only just to point out that these so-called danger signals were erected by himself, or at least at his suggestion. I am very far from applying any disparaging description to questions 6*a* and 6*b*, or to 12*a* and 12*b*. These questions seem to me to be eminently useful, helping the process of discrimination. They express in writing, with great clearness, what was and could be legitimately expressed *viva voce* to the jury. And this process of discrimination, so ingeniously and so vigorously and exhaustively pursued, most clearly in my opinion showed that the jury did not interpret the language of the defendant as imputing the commission of bribery and corruption strictly so called to the plaintiffs.

But there is another view of the affirmative finding to the third question which must not at all be overlooked.

The question was—

> "Did the words mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors?"

The culminating sting of this was that the plaintiffs were unfit to be employed as contractors; and the reasons alleged for this unfitness were twofold—first, that they were guilty of fraudulent and dishonest practices and conduct; and, secondly, that they were guilty of bribery and corruption. The jury plainly saw that fraudulent and dishonest practices were imputed, and, thinking that alone would be sufficient to render them unfit to be employed as contractors, answered "Yes," without determining that bribery and corruption, strictly so called, were imputed—that

is to say, enough was imputed in the earlier branch of the innuendo to show that the plaintiffs were unfit to be employed as contractors. This view would reconcile the findings 3, 4, 5, and 6*a*; and we should reconcile them in any way that is fairly reasonable. This, in my opinion, is a very possible, I am not sure it is not the true, view. The only matter then in the speech of the 4th March that was defamatory in the legal acceptation of the word "defamatory" was what was spoken with reference to the pipes, and this, according to the findings (see answer to the 6th question), was spoken on a privileged occasion, and without malice, and therefore the defendant, so far as the speech of the 4th March was concerned, was entitled to a verdict in his favour.

I come now to the 7th paragraph, which deals with the alleged slander of the 11th March. The answers relative to this do not present the difficulties which arise with reference to the alleged slander of the 4th March by the affirmative answer to the third question. There is no finding in any way even suggesting an affirmance of the existence of bribery and corruption. Bribery and corruption as an indictable offence are negatived by the negative answer to the tenth question. This finding—the negative answer to the 10th question—really, in my opinion, helps to show that in no place whatever, in reference to the speeches of the 4th March or of the 11th March, were bribery and corruption, strictly so called, as a criminal offence imputed to the plaintiffs; and the answer to question 11 shows that the jury were of opinion that the only charge of a defamatory character strictly so called that was really made by the defendant was a charge of fraud in relation to the pipes. As to this, the answer "yes" to the 12th question as to privileged occasion entitles the defendant to a verdict. It follows then that the defendant was entitled to a verdict in reference to the charges of oral slander.

I come now to the alleged libel of the 10th January, 1907, with which the 10th and 11th paragraphs of the statement of claim are conversant. Counsel for the plaintiffs complained specially of the findings of the jury as to the innuendo ascribed by the 11th paragraph of the statement of claim to this alleged libel. No doubt, imputing corruption and dishonesty to the plaintiffs in their efforts to procure a contract was a very grave

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matter indeed. At an early stage of the argument I asked was this alleged libel, set forth in the 10th paragraph of the statement of claim, capable of any such meaning. This was the only defamatory meaning suggested. In the course of the argument it was not suggested that the language set forth in the 11th paragraph could bear any other defamatory meaning. It was alleged in the 11th and 12th paragraphs of the statement of defence that the words did not bear the defamatory meaning alleged, or any defamatory meaning, and were not a libel. Having read these words again by themselves, as well as by reference to their context, I remain, notwithstanding Mr. Ronan's very strenuous argument, of the opinion I formed at the trial, that these words are not capable of the innuendo placed upon them—that they are not capable of being libellous of the plaintiffs, and, in fact, do not, as alleged in the 9th paragraph of the defence, refer to the plaintiffs at all. But what do I find with reference to the first libel? That the passage set out in the 10th paragraph of the statement of claim is a truncated passage. The printed pleadings with this truncated passage in it were before the jury, and the jury were plainly led astray by the truncating of the passage. The truncated passage in question is taken from the defendant's letter of the 10th January. A sentence is split up and the words which point the meaning of the sentence wholly omitted. The words "in view of such a statement" are excised. It is absolutely essential to read the whole of the letter of the 10th January :—

> "GENTLEMEN,—As a member of the Dublin Corporation and a ratepayer of the city, I should be obliged if you would inform me whether the Lord Mayor's statement at the monthly meeting of the Municipal Council, as reported in the *Daily Express*, *Irish Times*, and *Freeman's Journal* of the 8th instant, pages 2, 9, and 10, respectively, is correct. *In view of such a statement*, it is easy to understand how the Council was induced, by a large majority, to adopt the report, the result of which is to put a tax of £1250 on the already sorely burdened ratepayers. *If the statement be correct*, I do not see the possibility of any efforts, however strenuous, being successful in narrowing the way that leads to corruption; on the contrary, your action will have the effect of broadening it."

Now, this is the letter, and it is manifest that the excised

words "in view of such a statement," make plain what the writer wrote about, namely, the statements of the Lord Mayor. Of course the then Lord Mayor did not say, or hint, that the plaintiffs were guilty of bribery or corruption. All according to the then Lord Mayor was honest-dealing, of a patriotic character; and what the defendant condemned was the principle advocated by the Lord Mayor. The letter does not refer to pipes, nor does it refer to bribery or corruption. It does refer to the £1250 by which the plaintiffs' tender was larger than the rejected tender. It does not assert that there *had been* corruption, but merely stated that the impugned action *would have* the effect of broadening the way that leads to corruption. The words were directed to corrupt consequences that might flow—not to consequences that had flowed. The words were employed to discuss a dangerous principle, the rejecting the lowest tender, not because there was any infirmity attached to it, or the person who made it, but because it was well to accept the higher tender at the hands of an individual, if so doing would promote local industry; that the principle was in fact dangerous; that applying the rates—the moneys of the citizens—for the selection of a local firm, in fact to practically setting up a local firm for indirect objects, had an evil tendency; that it gave a wide scope of selection where the selection of tenders should and ought to depend on the price demanded and the character of the work; that the firm who could and would do the work adequately at the lowest figure should be selected in preference to a person who tendered to do it at a higher figure, though the doing by the latter would afford wider scope for the employment of local labour; that in fact regulating the acceptance of tenders by regard to what a local firm undertook to do in the employment of local labour, irrespective of the price charged, was a method of contracting both unjustifiable and dangerous. This was what Mr. Vance so vehemently asserted in the impugned passages; and I say no more with reference to it than this, that I believe the majority of the citizens of Dublin would agree with him. Certainly the impugned passage by itself, or with its context, or if I might say, nailed down on the platform of the occasion, did not, and was not capable of, imputing to the plaintiffs that they (the plaintiffs) were guilty of corruption and dis-

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honesty in their efforts to procure a contract with the Dublin Corporation.

This being so, what should we do? We can do that which we have the materials to justify us in doing. Whilst we could not say—whilst we are forbidden by the law of libel to say—that the language complained of in the 10th paragraph was a libel, we can, if we so think, say that it was not capable of being a libel, and if we do that, as I think we ought, the plaintiffs succeed in getting rid of the finding which was a principal object of attack, namely, the finding that they were guilty of corruption and dishonesty in their efforts to procure a contract from the Corporation of Dublin. Once we find that the language complained of in the 10th paragraph of the statement of claim is not capable of being a libel on the plaintiffs; every plea, every defence with reference to it, fails and should be struck out, because nothing remains to which there may be a plea or defence. Doing this eliminates the finding that the plaintiffs' counsel made in argument before us the chief object of attack, namely, that the plaintiffs were guilty of corruption and dishonesty in their efforts to procure a contract with the Corporation. But if the language complained of in paragraph 10 of the statement of claim is capable of being defamatory and libellous, I think the last plea, namely, the 15th in the statement of defence, is a good answer. This plea was upheld by the jury. It was pleaded to language complained of both in the 10th and 12th paragraphs of the statement of claim, and, in my opinion, is a good defence to both paragraphs. It was, as I said, upheld by the jury. An affirmative answer was given to it as applying to the language complained of in the 10th and 12th paragraphs of the statement of claim. Of course, I quite bear in mind what may be said, that inasmuch as the jury answered the 15th question in the affirmative, they must have held that the natural and ordinary signification of the words was that the plaintiffs were guilty of corruption and dishonesty in their efforts to procure a contract with the Corporation. I do not think this necessarily follows. The jury had the pleadings before them—they had both statement of claim and defence before them, and the statement of defence in the 15th paragraph was that the said words without the meaning set forth in paragraphs 11 and

12 of the statement of claim, and according to their natural and ordinary signification, were true in substance and in fact, and, in my opinion, these words, in their ordinary and natural signification, most certainly were true in substance and in fact. This plea, in the most explicit way, drew the attention of the jury to the question as to what was the ordinary and natural meaning of the words. They had the very question before them in precise language as to both the alleged libels (see questions 19 and 26). Why should we in any way modify these questions, or discard the findings of the jury with reference to them? They are right in point of form, simplicity itself in point of language, and the answers, in my opinion, absolutely correct. Even if a single finding was erroneous, I do not think that fact would infect another finding which I consider to be right so as to warrant my ignoring—setting at naught—that other finding. As the language contained in the 12th paragraph of the statement of claim is an extract from the defendant's letter of the 9th March, the whole letter should most unquestionably be read. If the whole be read, the so-called libel appears to me to be of a very mitigated type. No doubt the writer, as he said himself, wrote metaphorically. As to the alleged libel, I have already dealt with the plea of justification contained in the last paragraph of the defence—a defence which I think was entirely warranted by the evidence; a defence which was found to be correct by the jury, and whose finding as to it was manifestly approved by the learned Judge who tried the case.

Before I conclude, I wish to say just a word with reference to the 16th and 23rd questions, and the answers to them. In my opinion, they dealt effectually with the two so-called libels. The jury found that the two so-called libels were not libels; and having regard to the learned Judge's definition of a libel, which was not objected to, I think the answers to the 16th and 23rd questions amount to a verdict for the defendant on both the alleged libels. The learned Judge is careful to tell us what his definition of libel was. He states in his report as follows:—

"With reference to the findings of the jury, in answer to the 16th and 23rd questions (no libel), in telling the jury in the course of my

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charge what constituted a libel, I included in the definition of it that it was a publication *without justification or lawful excuse*."

The jury may well have thought there was ample excuse and justification for the language used; and in so thinking it does not at all necessarily follow that they adopted the innuendo in the 15th and 22nd questions.

As to the plea of fair comment, this, in my opinion, was very appropriate to the alleged libel of the 10th January, and was perfectly justified by the facts; but, as I have already said, the language of the letter of the 10th January is not, in my opinion, capable of being a libel on the plaintiffs. That letter is an excellent comment upon a forecast of what *might have*, but had *not*, flowed from actual facts, but most certainly cannot be interpreted as imputing bribery and corruption to the plaintiffs in their efforts to procure a contract from the Dublin Corporation. The plea of fair comment as regards the first libel was, as I said—if it was a libel at all, which I think it was not—fully established. As regards the second libel, a mere insignificant puny business compared with what we often see in this country in cases of Corporation interchanges, I think there was evidence to support several of the findings—justification in the ordinary sense of the language employed, no libel having regard to the learned Judge's definition of a libel, which he was careful to give us, the plea of fair comment, and privileged communication. Our Courts would be very busy, indeed, if there was to be an action every time there was a rhetorical flourish about a job, and a tasteless suggestion as to a method of correction, which the writer himself said was metaphorical—and it is to be remembered that the writer spoke hypothetically. He used the word "if." "If there be any who are willing to champion a job" was the language employed. However, it is only fair by the plaintiffs—just by their candour—to say that the learned Judge informs us that counsel for the plaintiffs said they did not attach much importance to the libels—indeed they said the same before us. What subsequently caused the importance as regards the libels was the meaning which was attached by the finding of the jury to the first libel, which, in my opinion, was caused by what I called the truncation of the letter

of the 10th January, and the fact that the libels, as distinguished from the alleged oral slander, were dealt with as practically negligible quantities.

J. L.

The plaintiffs appealed (1).

Appeal. June 11–13, 15, 16. July 30.

Ronan, K.C., *The Right Hon. J. H. Campbell, K.C.*, *Healy, K.C.*, and *T. Sullivan*, for the appellants.

Moriarty, K.C., and *E. V. Longworth* (with them *Jefferson, K.C.*), for the respondent.

HOLMES, L.J. :— July 30.

Madden, J., began his observations in the Divisional Court by a review of the material facts which seems to me to be both full and accurate; and I would be satisfied to adopt his judgment in its entirety, were it not for the dissent of Mr. Justice Gibson. But, having regard to this difference of opinion, as well as to the importance of the case, it will, perhaps, be more satisfactory for me to state in my own words the grounds on which I hold that the appeal ought to be dismissed. The action arose from circumstances that followed a tender made by the plaintiffs to the Dublin Corporation for the execution of drainage works in Clontarf. The Corporation had been prepared to enter into a contract with an Irishman named Kelly, if he had been able to give the requisite security; and, on his failing to do so, tenders for the contract were again invited by advertisement, in December, 1906, when seven were sent in, of which the lowest was that of Messrs. Binns of Croydon, the next being that of the plaintiffs, which exceeded the lowest by the sum of £1251. Messrs. Crawford & Frame had never been partners before; and some comments have been made upon their being associated on this occasion. Frame had carried on for some years a small iron business in Dublin; and in

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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the autumn of 1906 a limited liability company, whose principal shareholders were Frame and his family, was formed to carry on an iron foundry in Hammond Lane. It has been suggested that this was done with the view of tendering for the drainage contract; but this, like many other matters discussed, is, in my opinion, immaterial. Although Crawford seems to have had no previous connexion in business with Frame, this was no objection to the plaintiffs applying to be accepted as joint-contractors; and on the 31st December, 1906, the Improvements Committee of the Corporation decided to recommend for acceptance the plaintiffs' tender of £47,593 15*s.* 11*d.*, described as the lowest tender received from a local firm. Frame, who attended the meeting of the committee, stated that all the manholes and special castings would be made by the Hammond Lane Foundry Co.; and one of the inducements for the recommendation of the Committee was the belief that this would give much-needed encouragement to a deserving local industry.

There is no reason to suppose that, up to this point, the defendant had taken any part in connexion with the contract for the Clontarf works. I may add that there is no evidence to show that in his subsequent action he was desirous of promoting the interest of either Kelly or Binns, or that he was influenced by any other consideration than a sense of public duty. He had been for some years an active member of the Corporation; and I infer, from his letters and speeches in evidence, that his style is wanting in *suaviter in modo*, abounding in vituperative adjectives, and deficient in the charity that "believeth all things, hopeth all things." His first interference in connexion with the contract was when a motion was made at a meeting of the Corporation, held on the 7th January of last year, that the tender of the plaintiffs for the contract be accepted. The Lord Mayor made on this occasion a speech, which, however honestly intended, was, I regret to say, misleading and unfortunate. He stated—(1) that the plaintiffs were to do everything connected with the work in Ireland, and especially that all the pipes were to be manufactured in this country at the plaintiffs' foundry, and that there would thus be created "a new industry in our midst"; (2) that he, with Alderman Cotton, had waited upon the Local

Government Board, for the purpose of placing before them the position in which they were, and that the Board met them sympathetically, and said they had made out a good case for making a contract with the plaintiffs; and (3) that the City Engineer had recommended their tender. The defendant spoke after the Lord Mayor, using strong denunciatory language; but his attack was directed, not against the plaintiffs, but against the acceptance of their tender, which he said had the effect of putting a tax on the ratepayers of £1250. He also said that this was calculated to lead to corruption on a colossal scale, adding that he "did not suggest for a moment that there was any corruption at the bottom of this business; but that if it was to go on, what was to prevent certain firms approaching members of the Council and endeavouring to bribe them in order that their tender might be accepted?" The result was, that the motion was carried by forty-one votes to four, the majority being influenced, as subsequent events showed, by the speech of the Lord Mayor. The defendant, however, seems to have doubted the accuracy of the statements made therein, and began at once to make inquiries. Amongst other steps taken by him, he wrote to the Local Government Board the letter of the 10th January, which constitutes the first cause of action in order of date, although it is the third relied on in the statement of claim. It is a short letter, and begins by asking whether the Lord Mayor's statement at the meeting of the 7th as reported in the *Daily Express* was correct. It is manifest that the statement here referred to is the account given by the Lord Mayor of his interview with the Local Government Board. It was the only one of his statements about which the Board could give information; and their reply of the 15th January shows that it was understood by them in that sense.

The rest of the defendant's letter is written "in view of such a statement" and on the assumption that it is correct. If it is, the writer says, "I do not see the possibility of any efforts, however strenuous, being successful in narrowing the way that leads to corruption; on the contrary, your action will have the effect of broadening it." This letter was afterwards published in the Dublin newspapers of the 19th January; but

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whether I look at it as originally written, or as subsequently republished, I cannot conceive it capable of bearing a meaning defamatory of the plaintiffs. It, like the speech that preceded it, is directed against the acceptance by the Corporation of a tender that was £1251 too high, and the alleged approval of such acceptance by the Local Government Board. No charge is made either of corruption or of any other misconduct against the plaintiffs; and the plain, and in my opinion the only, meaning of the final sentence, is that the action of the Board on that occasion, if correctly reported, will have the effect in the future of broadening the way that leads to corruption. For this reason, I am of opinion that the defendant was entitled to a direction on this cause of action.

It is argued that the affirmative answer of the jury to a question based on a pleader's innuendo, that the words meant that the plaintiffs were guilty of corruption and dishonesty in their efforts to procure a contract with the Corporation, taken in connexion with their findings of "no libel," and that the libel was true in substance and in fact, shows perversity or at least confusion on their part.

I have noticed more than one instance of intelligent jurors being perplexed when an issue as to an innuendo is put to them where there is a defence of justification. The defendant has a good defence if he can justify an alleged libel according to the natural and ordinary signification of the words used; and when, as in this case, the questions apparently draw a distinction between a special meaning attached to the language by the pleader and its natural and ordinary sense, a jury is tempted to find that although the words are capable of bearing the special meaning, they are true in the sense which the jury believes ought to be given to them. I am disposed to think that this may account for the answers in this case; but whether this be so or not, I am prepared to hold that the defendant is entitled to a verdict on this cause of action, on the ground that the letter is incapable of conveying any defamatory imputation on the plaintiffs.

Having thus disposed of the cause of action that comes first in order of time, I now proceed to consider the others. The Local

Government Board in their letter of the 15th January, already referred to, gave a different account of their interview with the Lord Mayor from that stated by him at the meeting of the 7th. They said that they informed him that their sanction to the contract with the plaintiffs was not required, and that while the Corporation was not bound to accept the lowest or any tender, they should be prepared to satisfy the auditor that where the lowest tender was not accepted, it was a reasonable exercise of their discretion, and that they acted in good faith in the matter. The defendant made other inquiries regarding the statements of the Lord Mayor, with the result that he ascertained that the city engineer had not recommended the acceptance of the plaintiffs' tender, and that all the pipes required could not be manufactured in this country at the foundry in Hammond Lane. There was a meeting of the Corporation on the 4th February, at which it was resolved without opposition that the seal be withheld from the contract till the borough surveyor reported to the Council upon the the question of whether the entire ironwork could be cast in the Hammond Lane Foundry, and that a clause should be embodied in the contract bond accordingly.

The only other matter of importance that occurred before the next meeting of the Corporation on the 4th March was the discovery by the defendant of the following facts. By the specification which was the basis of the tenders, it was stipulated that stoneware pipes were to be used subject to the approval thereof by the city surveyor. The plaintiffs obtained quotations from Messrs. Brown & Sons, of Paisley, for the prices of stoneware pipes of different dimensions, which they thought were much too high. Frame had then an interview with a Mr. Simmons, the representative in Dublin of Brown and Sons, when the latter mentioned that they had earthenware pipes which were cheaper, and some specimens of which he submitted to Frame's inspection. Simmons said that pipes of this kind had been used in other contracts of the Dublin Corporation, and that Mr. Kelly, who had tendered for the Clontarf contract, believed that they would pass the city surveyor. Subsequently one of these earthenware pipes was sent to the surveyor, but there is no evidence that he was informed that it was glazed *earthenware*, and not *stoneware*, and, therefore,

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not the class of pipes contracted for. He, however, declined to approve of it. We have heard an elaborate argument that the plaintiffs acted honestly in this business; and perhaps they did according to the standard of honesty adopted by some contractors. But when everything possible is said on their behalf, there remains the fact that they were to supply a stoneware pipe subject to the approval of the city surveyor, and that they tried without any previous negotiation or notice to lead him to pass a pipe of a inferior quality. It is possible that my view of such a transaction is old-fashioned; but I feel bound to say that I regard their action in this respect as shady and discreditable.

I come now to the meeting of the Corporation of the 4th March, when the defendant moved and carried a motion that a special meeting be summoned for the purpose of rescinding the resolution accepting the plaintiffs' tender, and of giving the contract to the contractors that undertook to do the work for the lowest sum. The speech made by the defendant in support of this motion constitutes the first cause of action pleaded, and the second in order of time. The important parts of this speech are set forth in the statement of claim, and I do not propose to read them. It contains three charges against the plaintiffs, relating—(1) to their attempt to substitute for stoneware pipes articles of an inferior quality; (2) to the methods by which they induced the committee, and through it the Corporation, to accept a tender exceeding the lowest by £1251; and (3) to a matter which I have not yet mentioned, but which I shall now explain.

The defendant had, at the meeting of the 4th February, referred to the fact that Alderman Farrell held 100 shares in the Hammond Lane Company, and that Alderman Irwin's sister was also a shareholder; and he commented adversely, as I believe he was entitled to do, upon members of the Council being interested in the acceptance of a tender. But he did not then use words that could be construed as imputing bribery to anyone. At the same meeting, however, Councillor Daly said that he had been told by an alderman that Frame had given Alderman Farrell fifty of these shares for his support of the contract. Thereupon Alderman Kelly said that he was the alderman referred to by Daly, and that he had heard what he had told Daly from Alder-

man Irwin. I agree with Gibson, J., that this incident occurred after the defendant had made his speech. At all events, it was not referred to by him on that occasion, nor afterwards, until the meeting of the 4th March. He then referred to this allegation of bribery, saying that he did not know whether it was true, but that it would not surprise him if it were true in face of the transaction about the pipes; and he commented strongly upon giving a contract to a man who had made no attempt to clear himself of this charge. He also said that it was due to the Council that Alderman Farrell should clear himself of the imputation, and that if this was not done the charge would be believed by everyone. Farrell then interposed by saying that, on the day the charge was made in the Council, a writ was served on the gentleman who made it, and that to-morrow would be the last day for filing his defence; whereupon the defendant rejoined that he would be agreeably disappointed if Farrell went into the box—a remark which seems to have been regarded as jocular, inasmuch as it was received with laughter.

The foregoing abstract does not give everything said by the defendant in reference to bribery; but it contains the material portions of it, and is enough to show that it would be for the jury to say whether bribery of a criminal nature was imputed to the plaintiffs thereby. Having thus pointed out the three subjects dealt with in the speech of the 4th March which might be held to be defamatory of the plaintiffs, I proceed to consider the issues found on this cause of action. The defendant in his cross-examination said that he had not charged the plaintiffs with obtaining the acceptance of their tenders by false statements, or with having bribed members of the Corporation, and that he only charged them with reference to the pipes. He reiterated these statements more than once; and the Judge ruled on the application of counsel for the plaintiffs that this put an end to any defence founded on privilege to all imputations in the speech other than those relating to the stoneware and earthenware pipes. All the Judges of the Divisional Court seem to have thought that the defendant's answers in cross-examination were strained beyond their true meaning; and Gibson, J., especially finds it difficult to assent to the ruling of Mr. Justice Andrews. I do not, however, think it necessary to consider this matter, as the plaintiffs, who are the

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appellants here, cannot complain of it. The jury, having found that the words in the speech of the 4th March had been spoken by the defendant in relation to the plaintiffs' business as contractors, answered question 3, which is founded on an innuendo set forth in the statement of claim, by saying that the words mean that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors. Now all this answer, except what refers to bribery and corruption, may relate, and I think it clear that it does relate, to the charges about the stoneware and earthenware pipes; but I agree with Mr. Ronan that in so far as it finds that the plaintiffs were guilty of bribery and corruption, it must relate to something else, inasmuch as, however reprehensible their conduct might be in connexion with those pipes, it could not be described as bribery. It is, however, also clear that the bribery and corruption contemplated by the answer did not include pecuniary gifts to individual councillors with a corrupt motive. This is shown by their next answer, that the words do not mean that the plaintiffs had been guilty of a criminal offence. Reading, as we are bound to do, the two answers together, there is no inconsistency. Acts are often described as bribery which are not only not indictable, but comparatively harmless; and we must look for some kind of bribery and corruption other than criminal for the purpose of ascertaining what was contemplated in the third answer. This is not hard to find. The words evidently relate to the inducements held out that all the pipes would be manufactured in Hammond Lane, and that a new industry would thus be created in Dublin. Candidates at parliamentary elections are often charged by their political opponents with bribery and corruption when they promise that their party will support a generous contribution from the Imperial Exchequer for the benefit of a class of electors, or for the promotion of an industry in which their constituents are specially interested. I am of opinion that it was in a similar sense that the jury understood these words in the third question. In fact, I find Mr. Frame stating in his evidence that part of the defendant's charges of fraud and corruption was the plaintiffs' undertaking that a considerable part of the ironwork for the contract would be done in Ireland. Having thus stated my

views of the effect of findings 3 and 4, I pass on to the other issues in this branch of the case. In compliance with Mr. Ronan's requisition, the Judge confined the defence of privilege to the drainage pipes; and the jury found in answer to his questions—(1) That the words referring thereto were spoken and published in relation to the plaintiffs' business as contractors in a defamatory sense; and (2) that these words were spoken and published without malice, and in the belief that they were true. It being admitted that the occasion was privileged, the foregoing findings amount to a verdict for the defendant as far as these words are concerned. Question 6*a* is confined to the words complained of other than the words which refer to the drainage pipes—that is to say, the words which in answer to question 3 the jury find impute to the plaintiffs bribery and corruption; and they say that these words do not impute defamatory charges against the plaintiffs in relation to their business as contractors. Taking bribery and corruption in the sense in which they ought to be here understood, I am of opinion that the jury were entitled to find this issue as they did. I cannot hold as a matter of law that to say of a contractor that he was guilty of bribery and corruption in promising an elected body that if they would accept his tender for a contract, he would do the work in such a place and in such a way as would benefit the electors, would necessarily be defamatory of the contractor in relation to his business. This is a question of fact for the jury; and their answer to it, if not perverse or unreasonable, ought to be accepted.

For these reasons, I hold that the judgment on this cause of action cannot be disturbed. The debate on the 4th March resulted in a resolution being carried that no further steps be taken by which the contract would be given to the plaintiffs, and that a special meeting be summoned to rescind the previous resolution respecting their tender. This special meeting took place on the 11th March; but before that the plaintiffs caused to be published in the public Press a long letter relating to the defendant's speech of the 4th. It began with the earthenware pipe business, and purported to give an explanation of the plaintiffs' claim in connexion therewith, which certainly did not satisfy the Corporation, and which, I think, is far from convincing. It then referred to

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the alleged bribe of £50, and imputed to the defendant a knowledge of an apology by Alderman Irwin, and of an action brought against him by Alderman Farrell, which there is no evidence that the defendant possessed on the 4th March. Alderman Farrell on that day informed the meeting of the pending action, which was ended by an apology and a rule of Court at a later date.

The plaintiffs' third cause of action is a reply to this letter published by the defendant on the 9th March. It is a short document, and its subject is the statement made by the Lord Mayor in order to induce the Council to accept the plaintiffs' tender. The writer calls attention to the admitted errors in that statement, and he says that he does not see how any member of the Council can by any possibility do otherwise than vote for the rescinding of the resolution accepting the plaintiffs' tender, inasmuch as it was accepted because of the statements made by the Lord Mayor, not one of which had any foundation in fact. He points out how the ratepayers will be affected if the resolution is not rescinded, and concludes by declaring in vulgar language that members of the Council who are willing to champion a job of this kind should at the first opportunity be turned out of the Corporation. Admitting that these words are capable of a defamatory meaning, it is, I think, certain that the jury was at liberty to find that they are "no libel." This they did, and I am disposed to think that most men would agree with them. They were also at liberty to find the issues of fair comment and privilege in favour of the defendant, and that the words in their natural and ordinary signification are true in substance and in fact.

They have also found that the words bore the meaning placed in them by the innuendo; and I should have been surprised if they had done otherwise.

I can see no ground for interfering with the judgment for the defendant on this cause of action.

I come now to the last matter complained of—the defendant's speech at the meeting of the 11th March.

It is long, and deals with many subjects, the principal of which is the business of the stoneware and earthenware pipes; and on reading the passages complained of in the pleadings, I find they relate almost altogether to this charge. If there is anything

beyond this, a jury might well regard it as not bearing such a meaning as would constitute actionable defamation. Therefore, when the jury found that the words meant that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and are not fit and proper persons to be employed as contractors, the natural inference is that they attached this signification to the charges relating to the stoneware and earthenware pipes; and as neither the question nor the innuendo on which it was founded contains any reference to bribery and corruption, these findings are free from any apparent confusion or inconsistency, such as has been so fully discussed in connexion with the other alleged slander. The occasion being privileged as far as the charge relating to the pipes is concerned, the answers to the other questions determine this branch of the case in favour of the defendant.

If I am right in the views I have presented, there must be a general verdict for the defendant—a verdict which was in a measure anticipated by the unanimous vote of the Council rescinding the acceptance of the plaintiffs' tender, which a month before had been carried with only four dissentients. Having thus stated in some detail my opinion regarding the several causes of action and the issues raised thereon, I desire to add one or two observations applicable to the case as a whole.

Actions for defamation have always been regarded as within the peculiar province of a jury; and although a perverse or unreasonable verdict will not be allowed to stand, a Court ought to be very slow to interfere with one honestly arrived at. Now there can be no doubt that an impartial and intelligent jury, after hearing patiently everything that could be said on both sides, and after having been instructed by the Judge in a charge to which no objection was taken, resolved to find for the defendant. If their verdict had been asked on the case as a whole, and they had not been called on to answer nearly thirty questions, no one can doubt what that verdict would have been, and no Court could have set it aside on any legal principle with which I am acquainted. But if this be so, is the result arrived at to be disregarded, and is the action to be sent back for another trial

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because we cannot be certain of the grounds of their answers to one or two of a long series of complicated questions? When the Judge announced in the presence of counsel that he would direct a verdict for the defendant on the findings, the jury was still in the box; and then was the time to call attention to any inconsistency or obscurity. If this had been done, all difficulty might have been removed by the Judge asking the jury for an explanation. But no criticism of what the jury had done was offered, and no objection was taken to the Judge giving judgment for the defendant. Even if I found it a harder task than it is to understand and reconcile the findings, I should decline in the circumstances of the case to upset an honest verdict; but being of opinion that what was done by the jury is quite intelligible, I hold with even greater readiness that the appeal ought to be dismissed.

THE LORD CHANCELLOR:—

I felt during the argument that there was great difficulty in supporting the verdict of the jury, though I was at the same time satisfied that setting it aside would defeat the real intention of the jury and the presiding Judge; whether I should myself have found the same verdict as the jury on some of the questions is of course immaterial. Now, in the first place, I may say that on anything and everything connected with the pipes the verdict of the jury could not be challenged, and this was almost admitted. In everything connected with this part of the case, the defendant was protected by a privilege. I need only refer to the three grounds put forward by the Lord Mayor at the meeting of the 7th January, all proved to be inaccurate. Secondly, the fact that stoneware pipes were necessary, whereas glazed earthenware were sought to be substituted. Thirdly, the quotation produced by Mr. Crawford for stoneware was a copy, whereas the original when got by cross-examination turned out to be for earthenware.

The real difficulty in the case arises on what are at first sight the inconsistent and contradictory findings on 3 and 4. The difficulty on the other alleged contradictory findings arises in a much more modified form. It will be observed that

the finding of the jury on 3 is on an innuendo that the plaintiffs were guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors.

Now this finding cannot mean and include the giving of pecuniary gifts to individual councillors with criminal intent; for there is an express clear finding that the words charged did not mean that the plaintiffs had been guilty of a criminal offence. Therefore we must look for bribery and corruption other than criminal.

The word "corruption" in another sense had been largely used in the case in the cross-examination of defendant. We are bound, if we can, to treat the findings as consistent, and that may well be done by treating the words "bribery and corruption" as used in a general sense, and as referring to the procurement of a contract by representations as to the promotion of an Irish industry, and that all the pipes would be manufactured in Hammond Lane. It is in this sense that the words "bribery and corruption," so far as used, appeared in the speech of the defendant, who is more or less a political zealot whose zeal occasionally outruns discretion. But what influences me almost more than any other consideration is the course of the trial. The learned Judge who sent those questions to the jury, and received those findings, at the close of the case was allowed, unchallenged, to enter a verdict for the defendant on the whole case. If any objection had been then made, he might have removed any possible ambiguity by some further question asked. He understood his own questions, and apparently the findings given; and the alterations in his own handwriting on the Registrar's certificate show this; and his report approving of the verdict shows it.

I do not think we should be treating this patient and intelligent jury, as the Judge describes them, with fairness, or treating the Judge fairly, if we were to send the case to a new trial, on account of the apparent inconsistency brought out on the new trial motion, where a possible mode of reconcilement exists. I do not think it necessary to say anything on the other portions of the case as to the libels which have been so fully dealt with by my brother Holmes, and by the Lord Chief Justice in his judgment.

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FITZGIBBON, L.J.:—

It ought to be in any case most difficult, and under the circumstances of the present case it ought to be *impossible*, to set aside a verdict upon the ground on which the plaintiffs chiefly rely, and which has commended itself to Gibson, J., alone of the Judges who have considered this case—namely, that the jury did not understand their own findings, and contradicted themselves.

The action, being for defamation, was almost absolutely within the province of the jury. It was tried by a Dublin special jury, and an accurate and painstaking Judge, equally clear in his own understanding of facts and law, and careful in his presentation of them to the jury. The trial occupied six days, and it resulted in a verdict for the defendant, based upon the findings on some thirty questions, as to which the following note appears specially on the issue-paper, initialled by the Judge:—"Upon these findings the jury found for the defendant, the Judge having stated, without objection, that this amounted to a verdict for the defendant." He gave judgment for the defendant, with costs, on all the causes of action. He reports that he does not consider it necessary to report on the requisitions on both sides, or the discussion upon them, or the manner in which he dealt with them, "*as no objection is taken* in the notice of motion for a new trial on any of these grounds." As regards the objection that the verdict was against evidence, he says that he has given a remarkably full report, and he does not think that anything material is omitted. He reports that the questions submitted to the jury were "somewhat abbreviated without objection" from those first proposed on behalf of the plaintiffs, and four additional questions 6*a*, 6*b*, 12*a*, and 12*b*—which have caused much of the trouble—were afterwards framed in compliance with Mr. Ronan's requisition.

The Judge called the attention of the jury to each of the questions, and carefully to the alleged libels and slanders, and to the evidence bearing upon them; and he explained, without objection, what slander, libel, privileged communication, and fair comment respectively were. To assist the jury he sent them, without objection, a bundle of documents; the jury brought in what they manifestly regarded and understood to be a "clean

verdict" for the defendant, and the Judge saw nothing in their patient conduct throughout the prolonged trial which could be in any way justly described as perverse. They appeared to him to adequately understand the two charges of slander and the two charges of libel complained of in the statement of claim, and also the questions sent to them. The report concludes—"Without saying that I would have answered *every question* as the jury did, I thought the findings, having regard to my charge, were for them, and I think they understood my charge."

It is clear from this report that the jury intended to find for the defendant on all the causes of action; that the Judge understood them so to find, and that he did not disapprove of the verdict, upon which he gave judgment for the defendant with costs.

With such a report of such a trial, on what ground are we to order a new trial?

The notice asks us to do so on the grounds—(1) That the verdict was against evidence and the weight of evidence. Unless the verdict is so much against evidence as to be such as twelve reasonable men could not find, this ground fails. (2) That the findings show that either the conduct of the jury was perverse, OR that they did not correctly understand or appreciate the meanings of the questions submitted to them.

We cannot accede to either of these alternatives, unless we hold the Judge mistaken in his estimate of the honesty, or of the intelligence, of the jury.

Gibson, J., states his conclusion in the following words:—

> "The weakest part of plaintiffs attack on the verdict relates to the speech of March 11, as the innuendo of bribery and corruption and crime was rejected, and the innuendo found might be limited to the pipes. Here the findings are not necessarily inconsistent; the awkwardness arises from the cumbrous innuendoes and the form of the questions. The answer 12*a* negatived a composite question, and probably means that the only defamatory matter was in relation to the pipes. If this cause of action stood alone, I would hesitate to interfere with the verdict."

I must observe, on this, that I consider that the "awkwardness" with respect to the findings on the other causes of action, namely, the two libels and the speech of March 4, also arises

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"from the cumbrous innuendoes and the form of the questions"; and that they are not more necessarily inconsistent than those on the speech of March 11, and that the same probable explanation applies to all four sets of findings. I do not think that the "clean verdict" which has been found upon each and every cause of action, based upon what the jury held to be the natural sense and import of the words used, ought to be set aside because of findings upon *innuendoes* which the jury may have regarded as hypothetical, and not as overriding the verdict which they gave upon the natural sense of the words proved.

But Gibson, J., proceeds:—

> "The findings on the other causes of action seem so contradictory and uncertain that a new trial cannot be avoided, and I think the most convenient and fair course is to remit the whole controversy for further investigation."

It is remarkable that he treats the findings on all three of these causes of action as equally contradictory and uncertain. But the full discussion in this Court practically reduced the controversy to the findings Nos. 3 and 6*a*, on paragraph 4—the first speech.

I can not regard remitting this case to a second trial as in any sense either convenient or fair. That course may be inevitable, but if it be so, it can be nothing less than a grievous miscarriage. I borrow strong arguments against setting aside the verdict from Gibson, J., who came to his conclusion with hesitation. He says:—

> "When the answers were returned no objection or question was raised as to their real or apparent inconsistency. The Judge was given no opportunity of considering the difficulties so elaborately discussed before us, or of seeing whether any apparent conflict could be explained and removed. . . . The verdict, after a full and careful trial, has the approval of Andrews, J., is supported by the weighty judgments of my colleagues, and it is important that fearless and searching criticism of municipal administration should not be fettered by undue application of technicality. The jury (upon whom I make no reflection) obviously considered that Mr. Vance was actuated only by a sense of public duty, and had materials which broadly justified his action. Much of the difficulty that has arisen has been caused by disregard of time and sequence, and the multiplication of minor subjects of complaint, with complicated innuendoes."

Taking this as a preface, I turn to the findings on the letter of January 10, 1907, the speech of March 4, 1907, and the letter of March 9, 1907, in order of date, to see whether they are "so contradictory and uncertain" that a new trial cannot be avoided, and, unless this is so, I have the concurrence of Gibson, J., on the speech of March 11, that we cannot interfere with the verdict. The imputation of "bribery and corruption" is that to which the main arguments of the plaintiffs have been addressed. The letter to the Local Government Board is not, in my opinion, a libel on the plaintiffs at all; and it is only by inversion of dates, and by reading the subsequent speeches, that it can be suggested that it is capable of imputing corruption to any one. The defendant was entitled to demand information from the Local Government Board as to the truth of the Lord Mayor's statement of the Board's action, which he truly described as having induced the Council to put a tax of £1251 on the ratepayers. If that statement had been correct, the antecedent and illegal approval by the Local Government Board of a contract which imposed this tax might well be described as "broadening the way that leads to corruption," and this is all that the letter says.

The finding 15, that the words in this letter meant that the plaintiffs were guilty of corruption and dishonesty in their efforts to procure a contract with the Corporation, goes far to explain the meaning of the similar findings upon the other publications. When the defendant wrote the letter to the Local Government Board, he knew nothing against the plaintiffs, except that they had procured the contract at £1251 above the lowest tender, upon promises which the Lord Mayor alleged that they had made to him and to Alderman Cotton, as to "starting a new industry" in Dublin, that they were going to do all the work for their £47,000 contract in Dublin, and in particular that they were going to do all the iron work, including the casting of all the metal pipes, in Dublin. In short, the new industry was really the consideration for the £1251, which was given to them by those who accepted their contract under the advice of the Lord Mayor, supported by Alderman Cotton, and alleged to be recommended by the city engineer and sanctioned in advance by the Local Government Board. No answer to question 15 could, upon the evidence, vitiate

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the other findings upon the same publication in favour of the defendant; and finding 19, that the words were true in substance and in fact, is rendered consistent with finding 15, taking "corruption and dishonesty" to mean procuring the contract by the promises which, if the Lord Mayor was not under a delusion, had induced him and Alderman Cotton to pay £1251 of the citizens money for the new "Irish industry" in Hammond Lane. When the first letter was written, Vance knew only of the £1251. At the same time that he wrote to the Local Government Board he began to investigate the other statements of the Lord Mayor, and found them all equally untrustworthy. The flotation of the Hammond Lane Foundry, the list of shareholders, the short interval of time between its formation and the formation of the partnership between Frame and Crawford, the discovery that the city engineer had not recommended the contract—all these were subsequent to the letter. The finding that the letter imputed corruption and dishonesty is a key to all the findings, and it gives much point to Mr. Longworth's argument that by the time the jury retired "corruption and dishonesty" had been so bandied about between witnesses and counsel, that they had become mere words of abuse. At all events, I am satisfied that the jury used them in the sense, and only in the sense, in which they were used by the plaintiff Crawford in his evidence, and by his counsel at the trial, whenever they were not specifically used with reference to the charges of pecuniary bribery and criminal corrupt practices, in relation to the individual corporators who, or whose relatives, were shareholders in the Hammond Lane Foundry. At the subsequent meeting of March 9, Alderman Cotton himself said, "I am inclined to agree with Mr. Vance that the Lord Mayor was hoodwinked, and so was I." Another eminent corporator spoke of "the pitiable display of their own incapacity, and of their being cajoled by foreigners." Another said that he had been "deluded."

Bearing in mind that the speech of the Lord Mayor was based on what we must take to have been his honest understanding of the prospects, which he formed from what the plaintiff must have said to him, of benefiting Irish industry to the amount of £1251 by accepting the plaintiffs contract, it is impossible to say

that Mr. Vance and all the corporators who voted for the contract, and after Vance's investigation of the Lord Mayor's statements found them delusive, were not speaking on privileged occasions and justified in using strong language when they were discussing the rescission of the contract, which practically meant discussing whether the plaintiffs were people who ought ever to have been entrusted with it. The statement of claim sets out certain extracts only from the first speech; and in considering the findings upon it, we must remember that the evidence of the words actually used is presented in a manner unparalleled in my experience. One copy of each of three newspapers is entered on the Judge's notes as the proof of the words used. We found it impossible to follow these, for they all differed, and though the *Irish Times* was here treated as the authorized version, it is very different from other reports which were used as equally authentic at the trial. Reading the whole speech produces a very different impression from that which is produced by reading the statement of claim.

The plaintiffs main objection to the verdict rests upon the supposed inconsistency of answer 3 with a verdict for the defendant. To the question, Did the words mean that the plaintiffs had been guilty of *fraudulent and dishonest practices and conduct and were guilty of bribery and corruption* and were unfit persons to be employed as contractors, the jury answered "Yes." But to question 4 they answered that the words *did not mean*, that the plaintiffs had been "guilty of a *criminal offence* punishable by imprisonment." I agree with the Lord Chief Justice that these answers must be read together, and reading them together that whatever "bribery and corruption" is found to be imputed by No. 3, must exclude every form of criminal bribery or corruption. The Judge fully explained what criminal corruption was, and his explanation left but little to be imputed as *non-criminal* "bribery and corruption." The jury consistently gave the same answer to that question, whenever left to them; and it necessarily follows that the only bribery or corruption which is found by No. 3 to be imputed in the speech of March 4, is almost if not actually the same thing as the corruption and dishonesty which No. 15 found to

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have been imputed in the letter to the Local Government Board.

I felt the force of Mr. Healy's argument that the plaintiffs brought this action to clear their characters from the charge of pecuniary corruption. It might have been open to the jury to find this charge to have been made by the defendant in reference to the formation of the Hammond Lane Company, and the transactions by which one member of the Corporation and the relative of another became shareholders; but the jury has found, and were justified by evidence in finding, that the defendant did not make that charge against the plaintiffs. I think they found that what he did say was no more than "rubbing in" the specific charge which one Corporator, Kelly, made against another, Farrell, and the fact that a third, Irwin, had a relative on the list of shareholders. But he disclaimed making it himself, and he demanded inquiry, when Kelly's charge had not been, so far as he knew, contradicted or withdrawn. But, in justice to the plaintiffs, the verdict against them upon the other imputations as to the procuring of their contract by whatever misled the Lord Mayor and Alderman Cotton being *dubbed* "bribery and corruption" at the trial, must not be allowed to give the slightest colour to the suggestion that the trial and verdict leaves them under any imputation as to pecuniary misconduct in dealing with individual Corporators. The defendant's speech of March 11 begins by stating that he did not desire in any way to injure the characters of these men, but he went through the statements in their letter, to which the second letter was a reply, to show that they did not come into the Court with clean hands.

I pass over the charges about the earthenware pipes with the single remark, that the evidence of Mr. Crawford about the alleged quotation of stoneware pipes which he produced as an original document, but which turned out to be neither an original nor any quotation, but a document differing from a real quotation for earthenware pipes by substituting "stoneware" for "earthenware," while retaining the same prices, could not fail to damage the credit of his firm; and this, taken in connexion with the sending an earthenware sample for

approval without anything to indicate that it was not stone-ware, would, even of itself, account for the verdict which we are asked to disturb. It has not been suggested that any objection to the verdict could be sustained if the action related only to the defamatory language—however strong—which the defendant used upon that subject. The only way in which it becomes connected at all with the charges of so-called "bribery and corruption" is in reference to what the defendant said, as to the way in which the plaintiffs got the information which enabled them, in a remarkably short space of time, to form their partnership, make their tender, and obtain its acceptance, by the "Irish industry" attractions of Hammond Lane. There was a suggestion that they had some "connecting link" with the Corporation, and a hint that this link might be one or more of the Corporators who, as shareholders in Hammond Lane, had a pecuniary interest in the contract. But these interested Corporators, and not the plaintiffs, were the direct objects of that part of Mr. Vance's oratory.

Another source of difficulty in understanding the questions, and interpreting the findings, is to be found in what I cannot think to be anything less than the misuse *against the defendant* of the answer that he made no charge against the plaintiffs in either of his speeches, except with reference to the drainage pipes. His case was conducted, and his evidence was given, with remarkable candour as to what he had said, for he did not dispute that he had said anything that could be found in any newspaper report of either of his speeches, while his letters spoke for themselves. Therefore he certainly did not mean to deny that he had used any of the words upon which he had been cross-examined *ad nauseam* in terms which implied that they imputed bribery corruption and dishonesty, other than words which related to the alleged charges of personal corruption of Corporators which he consistently denied that he had ever made.

In my opinion, his answer did not extend beyond a disclaimer of the charge of pecuniary corruption, and the jury has found that he never made that charge. It follows that he is entitled to rely on privilege and fair comment as to all the other charges.

Appeal. 1908. CRAWFORD v. VANCE. Fitz Gibbon, L.J.

It is also to be observed that in relying as they have done on finding No. 3, which is on the first speech, as a finding of an actual charge of bribery, the plaintiffs counsel omit to notice that in the analogous question No. 9, on the second speech, "bribery and corruption" are omitted, and this is deliberately done, because the extracts from that speech which are in the statement of claim do not impute these offences. Gibson, J., has pointed out that for this reason the findings on the second speech are not necessarily inconsistent. But the jury may well have failed to notice this difference, and by their answers to 3 and 6*a*, to have really found, first that Vance did not charge the plaintiffs, in speech or letter, with criminal bribery, or with pecuniary corruption of any sort with Corporators or others, but that, by their representations with respect to Hammond Lane, and by their conduct in procuring their contract, and by their conduct with respect to the attempt to substitute earthenware for stoneware pipes, they gave sufficient justification for the charges which the defendant actually made of practices to which, though not criminal, the names of corruption and dishonesty were not inapplicable; and that the defendant, having reasonable grounds for his belief, believed all that he said against them in the sense in which he said it, and in which it should be understood.

In short, I hold that the defendant is entitled to retain the findings of "no libel" under the circumstances proved, and the verdict is in my opinion unassailable, having been honestly given by the jury in the exercise of the final jurisdiction which they possess in such cases under the analogy of Fox's Act.

Solicitor for the plaintiffs: *E. Ellard Brady.*
Solicitors for the defendant: *Horan & Irvine.*

R. ST. J. C.

IN THE MATTER OF AN ARBITRATION BETWEEN SMALL AND THE SCOTTISH LIVE STOCK INSURANCE CO. (1).

K. B. Div. 1908. Feb. 24. *Appeal.* April 22.

Practice—Costs—Taxation—Costs of second counsel—Arbitration—Question of law in issue—Discretion of Taxing Master—Difficulty and magnitude of case.

In an arbitration on a claim to recover £100, the value for which an animal was insured, the insurers disputed liability on two grounds, one of which related to the meaning of a clause in the policy, while the other raised an issue of fact.

At the hearing seven witnesses, three of whom were experts, were examined. The umpire awarded the full sum claimed, with costs.

At the taxation of the costs the Taxing Master allowed the costs of a senior counsel, but disallowed the costs of a junior counsel, on the grounds that the case was comparatively unimportant, and that, in the circumstances in which the arbitration was held, only one counsel was necessary.

On a motion to review the taxation of costs:—

Held, by the King's Bench Division (Boyd, Kenny, and Wright, JJ.), that the Taxing Master had failed to appreciate the magnitude and difficulty of the case, and that the bill of costs should be remitted to him, with a direction to tax the costs of a junior counsel.

Held, by the Court of Appeal, reversing the decision of the King's Bench Division, that, no question of principle being involved, the discretion of the Taxing Master should not be interfered with.

MOTION to review the taxation of the costs of an arbitration.

By a policy of insurance, dated June 22nd, 1906, the Scottish Live Stock Insurance Company contracted with William Small to pay the said William Small the value, not exceeding £100, of a short-horn bull, the property of the said William Small, in case the said animal should die during the currency of the policy from any accident or disease thereby insured against; it was also agreed between the parties that the policy should be in all respects subject to the conditions and indorsements

(1) In the King's Bench Division, before BOYD, KENNY, and WRIGHT, JJ.

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In re Arbitration between Small and Scottish Live Stock Insurance Co.

thereon, which should be deemed to be part of the policy, and should be, so far as they were to be performed and observed by the assured, conditions precedent to his right to recover thereunder. The conditions of insurance indorsed on the policy provided *inter alia*:—

Clause 15, "This policy does not insure against death of any animal . . . resulting from surgical operation, improper use, unskilful treatment, or wilful neglect."

Clause 19, "If any dispute shall arise as to whether the Company is liable under this policy, or as to the amount of its liability, the matter shall be referred to the arbitration of two persons . . . who may appoint an umpire . . . and the award of such arbitrators or umpire shall be binding and may be made a rule of Court. . . . The costs of, and connected with, the arbitration shall be in the discretion of the arbitrators or umpire."

It became necessary to pare and trim the hoofs of the said bull; and on November 7th, 1906, the animal was, for that purpose, cast under the direction of a veterinary surgeon. While he was so cast, the bull in struggling, broke one of his legs. The bull was subsequently inspected by a veterinary surgeon acting on behalf of the Company, and on his advice was destroyed.

The Insurance Company denied liability on the grounds that the paring or trimming of the bull's hoofs was a "surgical operation" within the meaning of the conditions of insurance; and that such paring or trimming of the bull's hoofs was rendered necessary by unskilful treatment and wilful neglect of the animal.

The matter was referred to the arbitration of two persons, who nominated Mr. John Gordon, K.C., as umpire. The arbitration was held at Belfast during the Summer Assizes; it was commenced after the rising of the Assize Courts, and was finished on the day on which it commenced, lasting about two or three hours; seven witnesses were examined, three of whom were experts; and the umpire awarded the full amount claimed, viz., £100, less the value of the carcass of the animal. He also awarded to the successful party his costs of the arbitration.

This award and also the submission to arbitration were subsequently made a rule of Court.

William Small was represented at the arbitration by one senior and one junior counsel. On the taxation of his costs, the Taxing Master, Master Tandy, reduced the fees of £7 7*s.* and £5 5*s.* paid to senior and junior counsel respectively, to £5 5*s.* and £3 3*s.*; but on objection to this decision, the Taxing Master restored the fee of £7 7*s.* for senior counsel, and disallowed altogether the costs of a junior counsel. This he did for the following reasons, as stated in his ruling:—

"After careful consideration of all the facts of the case, I have come to the conclusion that this is a case in which I should allow only one counsel. The case was a small one, and the arbitration was held after the ordinary legal day's work was done; so that the counsel who represented the plaintiff was available the whole time, and would devote his undivided attention to the case.

"Under the circumstances, exercising my discretion to the best of my ability and judgment, I have decided to allow one counsel only a fee of £7 7*s.*"

On taxation, the solicitor for William Small was allowed £5 for attendance, and his total costs as taxed amounted to £100.

J. C. Davison, for William Small:—

The submission and award having been made a rule of Court, the arbitration is a "cause or matter" within the meaning of Order LXV., Rule 65 (41). This case was not within the County Court Jurisdiction, and therefore the costs of two counsel should have been allowed as a matter of course. Even if the case is not within the express terms of the Rule, the Taxing Master should have treated it as a guide in exercising his discretion. The Court will, in a proper case, overrule a decision of a Taxing Master as to the number of counsel to be allowed on taxation: *In re Maddock* (1). The award of costs by the arbitrator means costs on the High Court scale: *Street* v. *Street* (2); and other items of the bill have been taxed on that scale, *e.g.* £5

(1) [1899] 2 Ch. 588. (2) [1900] 2 Q. B. 57.

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has been allowed to the solicitor for attendance. If the costs were not taxed as if this were an action, the fee would be 6*s.* 8*d.* The case was important: the arbitration was not a mere assessment of damages; liability was disputed on two grounds; and a substantial amount has been recovered. If the same sum had been recovered in an action in the High Court, two counsel would have been allowed. I can find no Irish case in which a second counsel was disallowed, except cases within the County Court jurisdiction. Even in England, where the Rule corresponding to Order LXV., Rule 65 (4), deals only with "actions," there is no absolute rule that the fees of only one counsel can be allowed in an arbitration: *Orient Steam Navigation Company* v. *Ocean Marine Insurance Company* (1).

T. Harrison, for the Scottish Live Stock Insurance Co.:—

An arbitration is not a "cause or matter" within the meaning of the Rule relied on: *Shaw and Ronaldson* (2). The Taxing Master is not bound by any Rule; and, in exercising his discretion, could follow the English authorities. In *Orient Steam Navigation Company* v. *Ocean Marine Insurance Company* (1), two counsel were allowed, but only on very special grounds. The general practice in England is to allow only one counsel on an arbitration. Where a Taxing Master has exercised his discretion on proper grounds, the Court will not interfere: *Wheeler* v. *Fradd* (3). [He also cited *Sinclair* v. *Great Eastern Railway Company* (4)].

BOYD, J.:—

I am of opinion that the Taxing Master has gone wrong, and has improperly disallowed the costs of a junior counsel. It appears from the bill of costs that seven witnesses were examined at the arbitration, three of whom were veterinary surgeons. An award was made allowing the full amount for which the animal in question was insured, less the value of the carcass; in other words, the full amount recoverable under the policy of insurance was awarded. Having regard to the issues involved in the case, I think that it

(1) 35 W. R. 771.
(2) [1892] 1 Q. B. 91.
(3) 14 T. L. R. 440.
(4) 21 L. T. R. 752.

was one of considerable importance, and that the Taxing Master has failed to appreciate its magnitude and difficulty.

KENNY, J.:—

I agree. The only question is, whether the Taxing Master has fully appreciated the magnitude of the case. He states in his report that he thought the case was not of importance, and comparatively trivial; but, comparing it with the class of cases which are tried in this Division, I do not think it can be properly described as trivial. The amount recovered was £100 less a small amount for salvage. If that sum had been recovered in an *action* in which two counsel had been briefed on behalf of the plaintiff, and if the costs of one counsel only had been allowed on taxation, I do not think we would have felt any hesitation—were the case before us—in allowing the costs of a second counsel. No doubt the arbitration was held on circuit at Belfast at a period of the day after the ordinary business was over, but I do not see how that affects the matter. Issues of importance were raised and decided; a number of witnesses—experts and others—were examined, and the sitting lasted a considerable time.

No case has been cited which decides that the costs of *one* counsel *only must* be allowed in an arbitration, and there is no hard and fast rule to that effect.

I think that the Taxing Master has not appreciated the magnitude and difficulty of the case, and that we should, as was done in *Barry* v. *Spaight* (1), remit the case to him on that ground.

WRIGHT, J.:—

I concur. It might be wrong to describe the case as one of great importance; but it would, in my view, be equally wrong to call it trivial. Two distinct issues were raised on it:— (1) Was the death of the animal caused by a "surgical operation" within the meaning of the 15th condition of the policy of insurance? (2) Was the death caused by wilful neglect in the care and treatment of the animal, involving a risk which might have been avoided?

(1) [1904] 2 I. R. 478.

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The plaintiff was obliged to call a number of witnesses, and to procure expert evidence, in order to prove his case; and, in the event, he recovered a substantial sum.

I think that, in the circumstances, it was the obvious duty of the plaintiff's solicitors to instruct two counsel.

J. C. W.

Appeal. April 22.

The Company appealed (1).

T. Harrison (with him, *Jefferson, K.C.*), for the appellant.

J. Gordon, K.C., and *J. C. Davison*, for the respondent.

FITZ GIBBON, L.J. :—

In each case of this kind, I think that the Court should see whether there is a question of principle involved, and should not merely substitute its discretion for that of the Taxing Officer.

This arbitration arose out of a cause of action which, except in the amount claimed, was of no special importance or difficulty; and the number of counsel to be allowed cannot depend merely upon the amount claimed. The question was, whether the bull's death was caused by an injury covered by the policy, or, as the defendants contended, either by negligence in dealing with the animal, or under a "surgical operation." It appears to me that the death arose from misadventure, while the animal was being dealt with in the ordinary way.

The Taxing Officer had to ascertain the proper costs to be allowed, not of a proceeding in the High Court, but of an arbitration; and there being no particular Rule applicable to the matter, we cannot better define the duty of the Taxing Officer than by applying to it the Rules which govern the cases which come within them. Wherever the Rules authorize the Taxing Officer to go beyond the scheduled amount, they limit his discretion by the words, "*having regard to the nature and importance of the case.*"

(1) In the Court of Appeal, before FITZGIBBON and HOLMES, L.JJ.

It must follow that he had power to decide that one counsel was enough in the present case, having regard to its nature and importance; and he has exercised his judicial discretion upon judicial grounds in so deciding. No question of principle is involved; and in my opinion neither the Court of Appeal nor the High Court is justified in substituting its discretion for his, by saying that he has allowed too much or too little.

HOLMES, L.J., concurred.

Solicitor for the Insurance Company: *Charles G. Jefferson.*
Solicitors for the plaintiff: *Peel & Son.*

R. ST. J. C.

IN RE WORKMEN'S COMPENSATION ACT, 1906; MURPHY, APPLICANT; GUARDIANS OF THE ENNISCORTHY UNION, RESPONDENTS (1).

Appeal. 1908. Nov. 3, 10.

Workmen's Compensation Act, 1906, *s.* 13—*Contract of service—Poor Law Guardians—Medical officer.*

There is no contract of service between a dispensary doctor and the Poor Law Guardians of his district, within the meaning of the 13th section of the Workmen's Compensation Act, 1906, involving liability on the Guardians in the event of his accidental injury or death in the discharge of his duties.

APPEAL by the respondents from the judgment of the County Court Judge of Wexford, dated the 29th April, 1908, at the Enniscorthy Sessions, whereby he awarded £300 to the applicant.

The following is the material part of the County Court Judge's note:—

"The facts here admitted are, so far as material, as follows:

"(1) The applicant is the widow of the late Dr. Denis Murphy, who was one of the dispensary medical officers of the Enniscorthy Board of Guardians, at a salary of £120 a year.

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1908.

MURPHY v. GUARDIANS, ENNIS-CORTHY UNION.

"(2) On the 15th October, 1907, whilst driving to attend an urgent case, admittedly in discharge of his duty as such medical officer, the applicant's late husband was thrown from his trap, and sustained injuries, from which he died on the 17th October, 1907.

"(3) The deceased left his widow and four children, namely, Denis, Eileen, Michael, and Bessie Murphy, him surviving, who were totally dependent on him.

"(4) Mr. O'Dempsey, solicitor for the respondents, admitted that the accident arose out of and in the course of his employment. He further admitted that the deceased, if otherwise within the definition of 'workman,' was one whose remuneration did not exceed £250; but he contended that the deceased was not a person who entered into, or worked under, a contract of service with an employer by way of manual labour, clerical work, or otherwise, within the meaning of section 13 of the Workmen's Compensation Act.

"This is my note on the question of law; and the following is my decision thereon, and on the matter and question submitted to me:—

"I held that the deceased was a person who worked under a contract of service with an employer; that his remuneration, for the purposes of this application, is to be taken as not exceeding £250 (this was admitted); that he was not employed by way of manual labour or clerical work; but that he was employed 'otherwise': and I gave a general construction to the word 'otherwise.'"

T. M. Healy, K.C., and *D. J. O'Brien*, for the appellants:—

The statute under which the medical officer is appointed is 14 & 15 Vict. c. 68, which provides that the dispensary committee shall appoint from time to time one or more medical officers of the district, with such qualifications and at such salary as the Poor Law Commissioners should approve of. There is no contract of service between the medical officer and the Board of Guardians. Section 1 of the Workmen's Compensation Act, 1906, in imposing the liability to compensation, uses the words "employer," "wages," "work," thus showing that "workmen" in the Act is to be taken in the popular sense. Statutory duties have been imposed on these

officers, such as the examination of persons alleged to be dangerous lunatics. Under 30 & 31 Vict. c. 116, this duty was to be performed without reward, at the request of two Justices. If the medical officer met with an accident while discharging such a duty, would the Guardians be liable? It was not until 1875 that the medical officers were remunerated for this work, under 38 & 39 Vict. c. 67, when the Justices were empowered to make an order on the Guardians for that purpose. The definition of "workman" is to be found in section 13 of the Act of 1906. "The key-note to the definition is to be found in the words 'has entered into, or works under, a contract of service with an employer.' These words clearly require that the 'workman' must stand in the relation of servant to the employer": Robertson and Wallace on Employers' Liability (4th ed.), p. 524. *Quo warranto* will not lie for the office of surgeon of a county infirmary: *Reg.* (*Jacob*) v. *Blaney* (1); but the grounds of the decision were that the office was held during the will and pleasure of the joint committee appointed under the Local Government (Ireland) Act, 1898, section 15—not that he was in the position of their servant.

James O'Connor, K.C. (with him *Ronan, K.C.*), for the applicant:—

The Act should receive a liberal construction. The definition clause shows that many cases were to be included which did not come within the earlier Act. The deceased was employed for the Guardians' "business." The case would be embraced by the general words "or otherwise." The question as to whether there was any contract of service was not raised before the County Court Judge.

Nov. 10.

THE LORD CHANCELLOR:—

We are all of opinion that this appeal must be allowed upon the ground that there was no contract of service between the deceased and the Board of Guardians. This is the material question—one upon which the decision of the learned County Court Judge was not based. It was not Mr. O'Connor's fault.

(1) [1901] 2 I. R. 93.

Appeal. 1908.

MURPHY v. GUARDIANS, ENNISCORTHY UNION.

The Lord Chancellor.

He naturally accepted the admission of the claimant; so that the question turned on the words which follow "contract of service." The 13th section of the Act says that "'workman' . . . means any person who has entered into, or works under, a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing." There is here no contract with an employer within the meaning of that section.

The consideration of the words "clerical work, or otherwise," does not arise until there has been found a contract of service.

We must allow the appeal.

Solicitor for the Guardians: *Thomas J. O'Dempsey.*
Solicitor for Mrs. Murphy: *B. J. O'Flaherty.*

W. G.

Appeal. 1908.

Oct. 29. Nov. 6.

IN THE MATTER OF GEORGE HENRY WAUGH, A BANKRUPT (1).

Hiring agreement—Household furniture—Custom—Order and disposition—Reputed ownership.

Articles of household furniture in the private residence of an individual at the date of his being adjudicated a bankrupt will be regarded as in the bankrupt's possession, order, or disposition; and the bankrupt will be regarded as the reputed owner of such articles, notwithstanding that he has obtained possession of them under an agreement of hiring and purchase on foot of which instalments remained unpaid at the date of the adjudication.

Ex parte Brooks (23 Ch. D. 261) followed.

THIS was an appeal by the Globe Furnishing Company from an order dated 21st September, 1908, of the Recorder of Belfast, confirming an order of the Registrar of the Belfast Local Bankruptcy Court in this matter, whereby it was adjudged that certain articles of household furniture and effects were, with the consent of the true owner, in the possession, order, or disposition of the

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

bankrupt, and that the bankrupt was the reputed owner thereof, and whereby it was directed that the same be sold by the assignees for the benefit of the creditors of the bankrupt.

George Henry Waugh, a medical doctor who carried on the business of a chemist in Belfast, was adjudicated a bankrupt on the 10th August, 1908. The bankrupt then resided with his wife in a private house in Belfast, the greater part of the furniture of which was his own property; but the furniture of the house included a number of household effects, the subject-matter of this appeal, namely: (1) a bedstead and two mattresses, valued at £8 8*s.*; (2) certain ornaments and linoleum, valued at £4 19*s.* 6*d.*; and (3) a bedroom suite and toilet set, valued at £31 16*s.* 6*d.*, all of which articles had been hired by the Globe Furnishing Company to Mrs. Waugh, wife of the bankrupt, under three hiring and purchase agreements, dated 10th February, 1906, 3rd April, 1906, and 19th September, 1906, respectively. Each of these agreements was signed by Mrs. Waugh, as "E. Waugh, wife of G H. Waugh," and the goods were delivered at, and remained in, the house of the bankrupt. Mrs. Waugh paid to the Globe Furnishing Company various sums of money on foot of the hiring agreements from time to time, and at the date of the adjudication there remained due on foot thereof the sum of £21 4*s.*

A very large number of affidavits were filed on behalf of the appellants, made by persons in the furniture trade, and alleging that it was the common practice in the trade to enter into agreements with private individuals for the supply of furniture on the hire-purchase system, not only in Belfast, but in London, Liverpool, and throughout the United Kingdom; that the said custom was well known to the public generally, and to creditors at large; and that by reason of the said custom no one would give credit either to a trader or a private householder on the strength of his having a well-furnished house. Affidavits in reply were filed by the respondents (the official assignees) to the effect that although certain firms in Belfast supplied furniture on the hire-purchase system, several of the largest firms in the trade never did so, save in rare and exceptional cases; and that no such general custom prevailed as was alleged by the appellants. Exhibits were also made by the respondents of advertisements issued by traders who

Appeal. 1908. *In re* WAUGH.

did supply goods on the hire-purchase system, holding out as an inducement to customers that their goods were supplied in private vans, and so that hirers would have all the advantages of actual purchasers. An affidavit was also made by the wife of the bankrupt in which she alleged that she entered into the hire-purchase agreements with the approval and on behalf of the bankrupt, and that it was with his money that the payments of instalments to the Globe Furnishing Company were made.

W. Martin M'Grath, K.C., and *R. Doyle* (with them *Davey*), for the appellants:—

1. The articles in question were not at the date of the bankruptcy in the possession, order, or disposition of the bankrupt, by the consent or permission of the appellants, who were the true owners within sect. 313 of the Irish Bankrupt and Insolvent Act, 1857, but in that of his wife, who signed the agreements, and whose hand it was that paid the instalments to the appellants: *Ramsay* v. *Margrett* (1).

2. The bankrupt was not the reputed owner of the articles. The affidavits filed on behalf of the appellants clearly establish a custom in the furniture trade of supplying goods on the hire-purchase system, which is now so universally established, and is so well known to the general public, that we contend that the time has now come when the Courts should take judicial notice of it. Exceptions to the general rule of reputed ownership have already been recognized in the case of many customs, *e.g.* the hiring of gas engines: *Ex parte Crossley* (2); the retention of wines and spirits sold in bond in the bonded warehouses of vendors: *Ex parte Watkins* (3); the hiring of furniture to hotel-keepers: *Crawcour* v. *Salter* (4); and the hiring of pianos to individuals: *Re Blanshard* (5). We only ask for recognition of a custom equally well if not better established. In *Ex parte Emerson* (6) it was held that the Court must take notice of the existence of a custom of hiring furniture, although in that case no evidence of such custom

(1) [1894] 2 Q. B. 18.
(2) [1894] 1 I. R. 235; [1895] A. C. 457.
(3) L. R. 8 Ch. App. 520.
(4) 18 Ch. D. 30.
(5) 8 Ch. D. 601.
(6) 41 L. J. (N. S.) 20.

was adduced. No doubt in *Ex parte Brooks* (1) it was held that the custom of furniture dealers to let out furniture on a three-years' hiring and purchase agreement did not disentitle the public to assume that an ordinary householder is the real owner of the furniture in his house, but the custom has become vastly more widespread and better known since 1883, and that case should not now be followed.

Ignatius J. O'Brien, K.C., and *T. J. Campbell*, for the respondents:—

As to the first point raised by the appellants, it is clear that the wife ordered the goods in the ordinary way as the agent of her husband. On the main question involved, that of reputed ownership, we contend that this case is governed by *Ex parte Brooks* (1), and that the onus of proof resting on the appellants has not been discharged. The presumption is, and must be, that the ordinary furniture in a man's house belongs to him. It is admitted that the greater part of the bankrupt's furniture did belong to him; and it is absurd to suggest that he was the reputed owner of the chairs in the bedroom and not of the bed. The appellants themselves advertise that they deliver furniture hired from them in "private vans," and this is held out as an inducement to customers; the inducement obviously being that the reputation of ownership may result. If such traders wish to avoid that result, an easy remedy is open to them, namely, to attach their names to all hired furniture.

W. Martin M'Grath, K.C., in reply.

THE LORD CHANCELLOR:— Nov. 6.

This is an appeal from the Recorder of Belfast, who has decided that certain articles of furniture were in the order and disposition of the bankrupt at the time of his bankruptcy, under the reputed ownership clause of the Irish Act. The bankrupt was a doctor and chemist in Belfast. He had a house there, with furniture in it, as to which, with the exception of some articles, no question arose. They were his, and assets to meet his creditors.

(1) 23 Ch. D. 261.

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In re WAUGH.

The Lord Chancellor.

But there was some furniture in his house which his wife had bought from the Globe Furnishing Co. in Belfast. She purchased on the 10th February, 1906, a brass bedstead, wire mattress, and wool mattress, costing £8 8*s.*; on the 3rd April, 1906, other articles of household use, costing £4 19*s.* 6*d.*; and, on the 19th September, 1906, others, costing £31 16*s.* 6*d.*—in all £45 4*s.* There had been payments which, if we were to go into the matter strictly, would make the first two purchases paid for; but I pass that by.

Two questions were raised—(1) That there was a separate property of the wife as to these purchases, and that the section had no application. That is disposed of by the facts. It is plain on the documents of hiring and purchase that Mrs. Waugh bought in the usual way, as agent for her husband, and on his credit. She is described as the wife, and she has made an affidavit proving this. (2) That there is a custom in Belfast, notorious, and to be taken to be within the knowledge of the Belfast public, that furniture of a house would be acquired under the hire and purchase system, and that the presumption that the owner of the house who had the possession of the furniture was also the owner of it was rebutted by this notorious custom.

The general law as to reputed ownership has been modified in application as to (*a*) particular classes of persons, (*b*) particular classes of goods, and (*c*) goods specially entrusted. The first class may be illustrated by the decision on hotel-keepers; the second comprises a number of articles, such as gas-engines; the third may be illustrated by cases like *Ex parte Watkins* (1). But the present case is one in which a medical man has a few articles in his house, bought on this system, inseparable in use and character from the whole; and it is said the presumption of ownership is rebutted as to them, and a number of affidavits have been filed showing that it is common to buy furniture on this system in Belfast and elsewhere, and the affidavits state an inference which the public, it is alleged, should and does draw as a matter of presumption.

This alleged custom would strike out one of the sections from the Bankruptcy Code, in the case of furniture; and in the

(1) L. R. 8 Ch. App. 520.

present case it is designed and applied so as to make possession under it the same as real, and to lead the general public to suppose that the possessor of the furniture was, in fact, the real owner, though he was not. For that reason no mark was affixed to the goods, and private vans were used to convey them to the dwelling. It does seem comical to apply this doctrine to the mattress as distinct from the sheets, and to a table as distinct from the ornaments on it.

The law in England was altered in 1883, and the reputed ownership clause was then applied to articles used in trade; but the law in Ireland is as it was in England in 1883, when the case of *Ex parte Brooks* (1) was decided. "The property of the bankrupt divisible amongst his creditors shall comprise all goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner" (2). It was laid down in *Ex parte Brooks* (1) that the fact that it is the custom of furniture dealers to let out furniture on a three-years' hiring and purchase agreement does not disentitle the general public to assume that an ordinary householder is the real owner of the furniture which is in his house.

Brooks' Case (1) applies still more strongly where the question is raised as to part of furniture in common use, and of no exceptional character as distinguished from the rest.

I may observe that in *Crawcour's Case* (3)—the hotel-keeper's case—it would have been wholly unnecessary to rely on the special position of hotel-keepers if the contention of the appellants is well founded.

The result of the appellants' contention would be that the Act could not apply to any species of household furniture sold on this system to any private individual, though every precaution was taken to prevent the public knowing the possessor was not the real owner; and this is said to be a notorious custom, which the public must be presumed to know and be governed by.

(1) 23 Ch. D. 261. (2) 32 & 33 Vict. c. 71, sect. 15, sub-sect. 5.
(3) 18 Ch. D. 30.

Appeal. 1908. *In re* Waugh.

I am not prepared to accede to the appellants' contention, and think the order of the Recorder was right, and should be affirmed.

Fitz Gibbon, L.J. :—

Upon the point that the goods were not in the order and disposition of the bankrupt, because they were bought by his wife, the documents establish the truth of her testimony that she made the purchase as the declared agent of her husband, on his credit and not on her own. The notice of the purchase describes her as a wife—no mention is made of any separate property—and the husband's name, occupation, and address are set out as those of the responsible purchaser. The wife clearly bought the furniture for him, with his authority, and on his credit; therefore he could have been sued for the price.

On the second and more important point argued before us, the law as to "order and disposition" is still identically the same in Ireland as it was in England in 1883, when *Brooks' Case* (1) was decided, and as it was here in 1894, when this Court decided *Crossley's Case* (2). That law appears to me to be that, in general, the presumption is that ordinary personal chattels belong to the person who has the possession of them: and that it is only in exceptional cases that reputed ownership does not follow the use and disposition of such property. It is hard to conceive chattels to which the *prima facie* or general rule would more rightly apply than to the furniture in question here. This is not the case of a whole house, or even of a room, being furnished at the same time or *en suite*; we have to deal with a number of ordinary articles of household use, mixed up with others of the same kind, undistinguishable the one from the other, as to use or apparent ownership, and all forming the furniture of a private house.

It also appears to me that the terms on which these articles were bought go far to negative the contention of the appellants. Dealing with goods in a warehouse, or machines used in business, or large and costly articles, it might reasonably be expected that a long period of credit might be given for "hire purchase," or even that the goods were merely hired. In the present case the appellants ownership was a sort of "dissolving view," and if

(1) 23 Ch. D. 261. (2) [1894] 1 I. R. 235; [1895] A. C. 457.

the instalments had been paid as agreed, the property would have rapidly passed over to the purchaser. In considering whether people were not justified in believing that the doctor owned the furniture, I cannot forget that if the instalments had been regularly paid, the property in one at least, if not in two, of the parcels of goods, would have passed completely to the person who had possession of them, before the date of the bankruptcy. As regards the alleged notoriety of the mode of dealing admitted, I hold that the advertisements marked here are admissible evidence of what the reputation of ownership and the knowledge of the general public were. The advertisement published by the firm to which one of the traders belonged who endeavoured to establish the notoriety of the alleged custom, expressly stated that precautions, by way of privacy and concealment, were taken with the object of giving "hire purchasers" *all the advantages* of real purchasers, and these must include the reputation of ownership, and the credit consequent upon the possession and use of property. The present claimants themselves are not free from observation in this respect, because their own advertisements hold out, as an inducement to customers, that the hired furniture will be delivered in "private vans." The notoriety claimed for the custom must be discounted by the attempts to conceal the nature of the dealing.

The law being still the same, we are asked to hold that the facts have changed since *Brooks' Case* (1), and that the exceptions in *Crossley's* (2), *Watkins'* (3), and *Crawcour's Cases* (4) have since become the rule. There is no evidence sufficient to enable us to find that the owners of private houses now obtain their domestic furniture so generally on the hire-purchase system that judicial notice ought to be taken of that system, as the custom of hotel-keepers to hold furniture on hire has been recognized. If I went into a new hotel, and there saw the name of Maple on all the furniture, or observed an advertisement that the hotel had been furnished by that firm, I might think it prudent, before attributing the reputation of ownership to the hotel-keeper to ask whether the furniture had been paid for.

(1) 23 Ch. D. 261. (2) [1894] 1 I. R. 235; [1895] A. C. 457.
(3) L. R. 8 Ch. App. 520. (4) 18 Ch. D. 30.

Appeal. 1908. *In re* WAUGH. Fitz Gibbon, L.J.

In such a case, proof of the existence of a custom shown to be well known to persons concerned, has been held to exclude the reputation of ownership. But the evidence before us is wholly insufficient to establish any change, either in the mode of furnishing private houses, or in the knowledge of the public, in Belfast, between 1883 or 1894 and the present time, which would justify us in finding, as jurors, that in that city people are no longer entitled to regard private householders as the owners of their furniture, or that it is now so notorious that furniture is probably held under hire and purchase agreements on which the instalments are still running, that credit ought not to be given to those who have it in their order and disposition.

HOLMES, L.J.:—

The question in this appeal is, whether the bankrupt at the time of his bankruptcy had, with the consent of the true owner, in his order, possession, or disposition, certain articles of household furniture, whereof he was reputed owner within the meaning of section 313 of the Irish Bankruptcy Act of 1857. The bankrupt was a physician practising in Belfast; and the articles in question were in the residence of himself and family, where I presume he saw patients in the way usual in his profession. The greater part of the furniture of the house was Dr. Waugh's property; and the subject of the present litigation consisted of some articles used with the rest, and in no way distinguished therefrom in their character or mode of use, which articles had been bought from the appellants on what is called a hiring and purchase agreement.

The first point made by the appellants is that this letting was made to Mrs. Waugh, and that therefore the articles were not in the possession of the bankrupt, her husband, with their consent. The lady, however, has made an affidavit in which she states that she acted in the transaction as the agent and representative of her husband; and I am satisfied by the documents produced that this was known to the appellants, and that they were well aware that the articles were to be used as part of Dr. Waugh's furniture.

The other and principal question raised is that the bankrupt was never the reputed owner of the goods by reason of the existence

of a custom in Belfast of letting household furniture of all kinds upon what is known as a hiring and purchase agreement, and that this custom is so well known that reputed ownership does not arise in that city from the mere possession and use of any articles of furniture.

Now, there is ample authority that the reputed ownership section cannot be relied on where there is a trade custom of taking a certain class of goods on hire so well established as to lead to the reasonable presumption that it was known by the bankrupt's creditors. This has been held in the case of pianos (*In re Blanshard* (1)), and in the case of the furniture of a hotel (*Crawcour* v. *Salter* (2)). I should be surprised to learn that any such custom exists in the case of the ordinary household furniture of a professional or business man. If there is, how can it be accounted for that the decisions to which I have referred, and other similar cases, only relate to articles of a particular kind? Many affidavits have been filed on behalf of the appellants, and but two or three on the other side; but, applying the good old rule of judging not by number but by weight, I accept the respondents' evidence, the effect of which is that although there are dealers in Belfast that supply household furniture on hiring and purchase agreements, this is done secretly, and that in that city, as elsewhere, household furniture is as a rule bought and sold in the usual way. The secrecy is strongly corroborated by one or two advertisements that have been produced, which are wholly inconsistent with the evidence that the usage deposed to is well known. I asked counsel for the appellants why did not their clients put on these articles some mark to show that it was not the hirer's property. The answer was that if they were to do this they would get no business. Of course they would not, as it is evident that both parties desire that the person in possession of the furniture should seem to the world to be its owner. In the case of *Ex parte Brooks* (3) the English Court of Appeal held that the fact that it is the custom of furniture dealers to let out furniture on a three years' hiring and purchase agreement does not disentitle the general public to assume that an ordinary

(1) 8 Ch. D. 601. (2) 18 Ch. D. 30. (3) 23 Ch. D. 261.

Appeal. 1908. *In re* WAUGH. Holmes, L.J.

householder is the real owner of the furniture which is in his house. I see no reason for not following this decision.

It has been said that the present law is harsh, and that there has been some statutory change of it in England; but we must take Irish law as we find it.

Solicitor for the appellants: *R. J. Porter.*
Solicitor for the respondents: *J. Alexander.*

R. ST. J. C.

Appeal. 1908. Nov. 10.

COYLE *v.* MAHON.
GREEN *v.* MAHON (1).

Parliamentary franchise—Inhabitant householder—Dwelling-house—Burdensome easement—41 & 42 Vict. c. 26, s. 5.

The voter, an inhabitant householder, had sublet one room on an upper story of the house, retaining in his own occupation the kitchen, a room beside the kitchen, and a front bedroom upstairs. It was necessary for the sub-tenant to pass through the kitchen in order to reach his room, or to reach the yard, where the only water-closet and sanitary conveniences for the house were.

The Revising-Barrister found—(*a*) that the sub-tenant had, as against the voter, the right of passage through part of the qualifying premises, such right being necessary for the ordinary user of the premises sublet; (*b*) that the voter was in exclusive use of rooms other than the kitchen, and that such rooms did not by themselves constitute a dwelling-house; (*c*) that the voter's dwelling-house was made up of the rooms and the kitchen:—

Held, that the case came within *M'Bride* v. *Bryans* (*ante*, p. 329), which the Court declined to re-open.

APPEALS from the decisions of Mr. P. Lynch, K.C., and Mr. J. S. Baxter, Revising-Barristers for the borough of Londonderry.

The case of *Coyle* v. *Mahon*, as stated by Mr. Lynch, was as follows:—

The name of James Coyle appeared on the list No. 17 of the South Division of the County Borough of Londonderry, being the

(1) Before LORD O'BRIEN, L.C.J., and FITZGIBBON and HOLMES, L.JJ.

Town Clerk's List of male persons entitled to vote in an election of a member to serve in Parliament as follows :—

No.	Surname and Christian Name.	Place of Abode.	Nature of Qualification, whether Rated Occupier or Inhabitant Householder.	Name or Description of Premises Rated, street, lane, or other like place in this County Borough, and number of the House (if any) where the property is situate.
213	Coyle, James,	28, Deanery Street,	Inhabitant Householder,	House and yard, 28, Deanery Street,

The said name was duly objected to.

It appeared from the evidence that the voter was tenant of the qualifying premises during the qualifying period. He had sub-let one room upstairs to a sub-tenant named Michael Gavigan, who occupied the said room as an inhabitant householder. The voter was in occupation of the kitchen, a room beside the kitchen, and a front bedroom upstairs. It was necessary for the said sub-tenant to pass through the kitchen in order to reach his room upstairs. It was also necessary for the said sub-tenant to pass through the kitchen in order to reach the yard. In the said yard there was the only water-closet for the said house, and also the other sanitary conveniences attached to the said house, none of which was upstairs.

It was contended on behalf of the objector, that on the foregoing facts the sub-tenant had the right of passage through the said kitchen, being part of the voter's qualifying premises, and that the case fell within the decision of *M'Bride* v. *Bryans* (1).

It was contended on behalf of the voter that he was in exclusive occupation of at least a room off the kitchen and a bedroom, and that I could amend, or that I should find that he was in separate occupation of the two rooms and kitchen as his dwelling-house, subject to the rights of passage aforesaid, and not either as joint tenant or joint occupier thereof, and that I ought, if necessary, to amend to make that matter clear.

(1) *Ante*, p. 329.

Appeal. 1908. COYLE v. MAHON.

On the foregoing evidence I found the following facts:—(1) That the sub-tenant had, as against the voter, the right of passage through part of the qualifying premises; such right being necessary for the ordinary user by the said sub-tenant of the premises sub-let to him by the voter. (2) That the sub-tenant was not a lodger, but an inhabitant occupier. (3) That the voter was in exclusive occupation of rooms other than the kitchen, and that such rooms did not by themselves constitute a dwelling-house. (4) That the voter's dwelling-house in the ordinary sense of the word consisted of a kitchen, room, and bedroom. (5) That the voter occupied the kitchen and two rooms mentioned, separately, as his dwelling-house, save in so far as occupation was affected by the right of way mentioned.

I was of opinion that I could not amend the description of the qualifying premises; but I would have made any amendment that I lawfully could make in favour of the vote.

On the above findings I was of opinion that the case was governed by *M'Bride* v. *Bryans* (1), and I therefore expunged the name.

The case of *Green* v. *Mahon*, before Mr. J. S. Baxter, was exactly similar except that the voter was in occupation of one room and the kitchen. Forty-five other cases were scheduled as depending on the cases stated.

Ignatius J. O'Brien, K.C., A. M. Sullivan, K.C., and *Patton*, for the appellants:—

The questions are—(1) whether the present cases are governed by *M'Bride* v. *Bryans* (1), and (2) whether the Court is bound to re-affirm that decision. *M'Bride* v. *Bryans* (1) is more fully stated in Lawson's Notes of Cases (1907), p. 226. It is inconsistent with *Magee* v. *Colquhoun* (*Evans' Case*) (2) and *Torish* v. *Love* (3). *M'Bride* v. *Bryans* (1) was treated as an isolated case. The recent revision shows how unexpectedly far-reaching it is, and proves that in the public interest the principle involved is deserving of reconsideration. The Court was divided, and the decision of the majority is at first sight totally at variance with section 5 of

(1) *Ante*, p. 329. (2) Lawson (1885–1893), 85. (3) [1894] 2 I. R. 372.

41 & 42 Vict. c. 26 (Parliamentary and Municipal Registration Acts).

Appeal. 1908.

COYLE v. MAHON.

D. S. Henry, K.C., and *Osborne*, for the objectors :—

The findings in *Coyle* v. *Mahon* are stronger against the voter than those in *M'Bride* v. *Bryans* (1). As to exclusive possession, see *Riddall* v. *Mullan* (2), where the question was fully discussed, and the singular case of *Glinn* v. *Brennan* (3) was very fully considered. In *Torish* v. *Love* (4) there was merely a right in the voter's mother to reside in his house, but she enjoyed no right to occupy any specific part of it. But where the right was given to occupy a specific room in the voter's house he was held disentitled to the franchise: *Torish* v. *Brown* (5). *M'Bride's Case* (1) was carefully considered. The Court reserved judgment; and to allow it to be re-opened would involve the right to re-argue any case in which there was a dissentient member of the Court.

Sullivan, K.C., in reply :—

M'Bride's Case (1) is an eminently unsatisfactory authority—opposed to authority and statute. The point on which it was decided was started at the very close of the respondent's argument. It was never supposed that it would involve such serious consequences. Here forty-seven votes depend on it in one constituency alone. The increasing importance of that point is enough to justify the Court in allowing the matter to be re-argued.

LORD O'BRIEN, L.C.J. :—

This case has been argued with considerable energy by Mr. O'Brien and Mr. Sullivan; but we all think that it is governed by *M'Bride* v. *Bryans* (1). Mr. Lynch, who stated this case so clearly, brings it within *M'Bride* v. *Bryans* (1). He stated the facts as they existed; and no other conclusion than the one he arrived at would be warranted. He found that the sub-tenant had, as

(1) *Ante*, p. 329.
(2) [1903] 2 I. R. 417.
(3) 29 Ir. L. T. R. 79; Lawson, (1894–1900), 10.
(4) [1894] 2 I. R. 372; Lawson, (1885–1893), 85.
(5) [1894] 2 I. R. 373.

Appeal. 1908.

COYLE v. MAHON.

Lord O'Brien, L.C.J.

against the voter, the right of passage through part of the qualifying premises; such right being necessary for the ordinary user by the said sub-tenant of the premises sub-let to him by the voter.

I turn to *M'Bride* v. *Bryans* (1), and venture to read a passage from my own judgment in that case:—"The question in the case is—Does the tenant of the lower story occupy separately the subject-matter of her tenancy? The lower story includes a kitchen, and the tenant of the upper story has a right of passage to the upper story over a part of this kitchen. Can it be said that the tenant of the lower story occupies separately? I think not. She has not the sole and exclusive use of the kitchen. The tenant of the upper story has a right to go through this kitchen at all times during the day and night—a most burdensome right. I know no right that in any case would be more burdensome or offensive. That being so, I do not think the lower tenant has a right to occupy or use the kitchen part of the subject-matter of the tenancy solely and exclusively. Can it be said that while the upper tenant is actually using that part of the floor of the kitchen that leads to the stairs, he is not occupying for the time being a part of the kitchen—that is to say, a part of the lower tenant's tenancy?"

This is all relevant to the present case. In *M'Bride* v. *Bryans* (1), Lord Justice Holmes and I dealt with the question reserved for our consideration, namely, whether the Revising-Barrister was right in rejecting the vote because the tenant of the lower story was not in exclusive occupation of the whole of the qualifying premises: see Lawson, vol. iii., part vii., 1907, where the contentions of the respective solicitors and the reservation of the Revising-Barrister are set out. Lord Justice Holmes and I applied ourselves to the question we were asked to decide. The question before us was not whether, when a tenant occupied exclusively the whole of the qualifying premises, he lost his vote by reason that he used jointly with another person, say, an ash-pit, or lavatory, or stairs, or hall, or reading-room, which, though part of and belonging to the general building, was not part of the qualifying premises. The question before us in *M'Bride* v.

(1) *Ante*, p. 329.

Bryans (1) was, whether there was an exclusive occupation where there was the right of way in question over a part of the qualifying premises. The same question is here. We decided that the Revising-Barrister was right, and so we decide here also that he was right.

Judgment was reserved in *M'Bride* v. *Bryans* (1), and the case dealt with with great deliberation. It cannot now be re-opened.

Lord O'Brien, L.C.J.

I repeat what I said in *M'Bride* v. *Bryans* (1), that the right which was found to exist—viz., to go over part of the qualifying premises at all times, both day and night—seems to me a most burdensome right, and does not at all suggest to me the application of the maxim, "*De minimis non curat lex.*"

FITZ GIBBON, L.J. :—

The first, third, and fourth of Mr. Lynch's findings, and the first, fourth, and fifth of Mr. Baxter's findings bring these cases within the express terms of *M'Bride's Case* (1), which binds me; and I therefore must concur in affirming the decisions of the Revising-Barristers. These findings are :—

> "(1) That the sub-tenant had, as against the voter, the right of passage through part of the qualifying premises (in both cases the kitchen), such right being necessary for the ordinary user by the sub-tenant of the rooms (or room) sublet to him;
>
> "(3) (4) That the voter was in exclusive occupation of rooms (or a room), other than the kitchen, during the qualifying period; but that such rooms (or room) did not by themselves constitute a dwelling-house;
>
> "(4) (5) The voter's dwelling-house was made up of the rooms (or room) and the kitchen."

In both cases there is an express finding that the "dwelling-house" includes the kitchen; and *M'Bride's Case* (1) decides that a "burdensome" right of passage through a kitchen which is one of the rooms included in the qualifying premises destroys the franchise of the occupier, because it is inconsistent with that "exclusive use" which the majority of the Court held to be essential to the qualification of an inhabitant householder.

(1) *Ante*, p. 329.

Appeal. 1908.

COYLE v. MAHON.

Fitz Gibbon, L.J.

Having, in *M'Bride's Case* (1), anticipated that "many thousands" of cases, or even "countless cases," might be found in which the franchise had been given to inhabitants who, occupying parts of houses as separate dwellings, also used for their dwellings other parts of the same houses, of which they had not the sole control or exclusive occupation, I am not surprised to find that the present decision disfranchises forty-seven voters in Londonderry alone. But I am bound by *M'Bride's Case* (1), though I am still unable to understand how it can be reconciled with the Act of 1878, sect. 5, which enacts that—

> "Where an occupier is entitled to the sole and exclusive user of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part."

We can not re-open the question, unless or until the full Court thinks it right to reconsider it, as *Hasson* v. *Chambers* (2) was reconsidered after *Stribling* v. *Halse* (3), which it had followed, had been "discredited."

HOLMES, L.J. :—

I am always willing to reconsider a decision when due care and attention have not been given. *M'Bride* v. *Bryans* (1) was at hearing for two days, and the Court reserved judgment. If we were to reconsider it, I should come to the same conclusion.

Solicitors for the appellants: *Charles O'Doherty* ; *John Tracey.*
Solicitors for the respondent: *Babington* ; *C. S. Caldwell.*

W. G.

(1) *Ante*, p. 329. (2) 18 L. R. Ir. 68. (3) 16 Q. B. D. 246.

EVANS *v.* KEANE (1).

KEANE *v.* EVANS.

K. B. Div.
1908.
Nov. 2.

Practice—Stay of proceedings—Cross-actions in respect of same occurrence—Staying second action before delivery of statement of claim—Remedy by counter-claim.

Where cross-actions in tort had been brought by two persons against each other in respect of the same occurrence; and statements of claim had not been delivered in either action, the Court, on the motion of the plaintiff in the action which was prior in point of time, stayed the second action, leaving the plaintiff therein to his remedy by counter-claim in the first action.

MOTION to stay proceedings in a second action.

The actions were cross-actions to recover damages for negligence, and arose out of a collision which occurred on a public road between a motor-car, driven by William St. Leger Evans, and a horse and car, driven by Patrick Keane. The writ in the action of *Evans* v. *Keane* was issued on the 24th September, 1908; service was accepted on the 16th October, 1908, and an appearance entered on the 27th October, 1908. Damages were claimed for negligence on the part of the defendant in driving the horse and car.

The writ in the action of *Keane* v. *Evans* was issued on October 19th, 1908; service was accepted on October 21st, 1908, and an appearance was entered on October 28th, 1908. Damages were claimed for negligence on the part of the defendant in the driving of the motor-car.

No statement of claim had been delivered in either action on the date when the motion was heard.

M. B. Lynch, for William St. Leger Evans (the plaintiff in the first action):—

The action which is second in point of time should be stayed:

(1) Before ANDREWS and WRIGHT, JJ.

K. B. Div. 1908. EVANS v. KEANE.

Rees v. *Lunmoore* (1); *Rechnitzer* v. *Samuel* (2); *Thomson* v. *South-Eastern Railway Co.* (3). This is the proper course as no pleadings have been delivered in either action.

J. W. Hynes, for Patrick Keane (the plaintiff in the second action).

ANDREWS, J.:—

We shall stay the second action—that of *Keane* v. *Evans*—and allow Mr. Evans his costs of this motion as costs in the action of *Evans* v. *Keane*. We shall not allow Mr. Keane's costs of this motion, because he could have proceeded by way of counter-claim in the first action.

WRIGHT, J., concurred.

Solicitor for William St. Leger Evans: *Herbert Malley*.
Solicitor for Patrick Keane: *J. C. Conroy*.

J. C. W.

(1) 4 T. L. R. 355. (2) 95 L. T. (N. S.) 75. (3) 9 Q. B. D. 320.

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ARBITRATION—*Term of contract—Work done—Ascertainment of price—Submission to arbitration—Condition precedent—Death of party before award—Right to continue proceedings—Personal representative—Surviving partner—R. S. C., I.* (1905, 22*nd February*), *Order XVII., R.* 4.] A clause in a building contract, made between parties designated therein as "the employer" and "the contractor," provided that, in the event of a dispute in reference to the quantities or prices of additions, variations, or omissions, the items should be referred to the arbitration of two architects, one to be named by each of the parties, with power to them to appoint an umpire; and that the decision of the arbitrators and umpire as to such items should be conclusive and binding on the parties. The clause also provided that the employer's architect should give a certificate for the amount so found by arbitration, and that the employer should be bound to pay the contractor "the sum specified in the architect's certificate, and no more." A submission to arbitration under the clause was made a rule of Court, and the umpire made an award, which was, by order of the Court, sent back to him in consequence of his having included in it matters not submitted to him. Before any further award was made the contractor died. On a motion for leave to continue the proceedings in the joint names of the personal representative of the contractor and of his surviving partner:—*Held*, by Palles, C.B., and Boyd, J. (Johnson, J., dissenting), (1) that ascertainment of the price of extras by arbitration was a condition precedent to the right to recover any sum in respect thereof; (2) that the proceedings should be continued in the name of the personal representative of the contractor, but not in the name of his surviving partner. *Blundell* v. *Brettargh* (17 Ves. 232) distinguished. *In re Arbitration between Donovan and Burke* K. B. 143

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ARREARS OF RENT — Promissory note — Purchasing tenant—Evasion of statute
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BAILIFF—Misconduct—County Court decree—Liability of sub-sheriff—Time - 138
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BANKRUPTCY—Hiring agreement—Order and disposition - - - - - 612
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BARONIAL GUARANTEE—*Local Government—Guaranteeing area—Arrears due to county fund—Retrospective rating—Estimate for current year—Irish Tramways Act*, 1883 (46 & 47 *Vict. c.* 43), *ss.* 6, 7—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 47, 57, 80—*Local Government* (*Ireland*) *Act*, 1900 (63 & 64 *Vict. c.* 63), *s.* 2—*Local Government* (*Adaptation of Enactments*) *Order*, *Article III—Public Bodies Order*, 1904, *Articles* 66-69.] A County Council has power to assess an area which is liable to a baronial guarantee under the Tramways (Ireland) Act, 1883, for an amount, to be estimated and raised as poor rate, but as a separate item thereof, sufficient to cover—(1) a debit balance carried forward against the guaranteeing area from previous years, and (2) a sum estimated as sufficient to meet the certificates expected to be presented during the current financial year; as well as the sum required to recoup the county funds for the amount of the certificates actually presented and paid in the current financial year. *The King* (*Tighe*) v. *Mayo County Council* - - - APP. 160

BELFAST—Custom of port—"Hoisting" or "Whipping" - - - - - 482
See CUSTOM OF PORT.

BETTING-HOUSE—*Gaming—Using premises for betting—Proof of bet on one occasion only—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.] A police constable (acting under instructions) went into the appellant's shop, and there made a bet with him of two shillings on a horse-race. The constable deposited the two shillings with the appellant, and gave him a piece of paper on which was written the amount of the bet and the name of the horse:—*Held*, not sufficient evidence to justify the conviction of the appellant under section 3 of the Betting Houses Act, 1853. *Per* Lord O'Brien, L.C.J.: The mere naked fact, without more, that a bookmaker made one bet in a house in which he resided is not enough to attach to the house the character of a betting establishment. *Per* Gibson, J.: In certain circumstances a single bet in a house or place accepted by the person using same, without any proof beyond the transaction itself, and the conduct and language of the parties, might warrant an inference of guilty user. *M'Connell, Appellant*; *Brennan, Respondent* - - - - - - - K.B. 411

BIAS—Justices - - - - - - 285
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BUILDING CONTRACT—Arbitration clause—Death of party before award - 143
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BUTCHER—Possession of unsound meat—Exposure or conveyance for sale - 234
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BY-LAW—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 2—"*Peaceful picketing*"—*Meaning of words* "at or near"—*Right to enter on private property—Onus of proof—By-law prohibiting an act without permission in writing—Onus of proving absence of permission*—40 & 41 *Vict. c.* 56, *s.* 78.] The Trade Disputes Act, 1906, in legalizing "peaceful picketing" does not confer a right to enter upon private property against the will of the owner. The Belfast Harbour Commissioners had made a by-law, under their statutory powers, prohibiting persons from addressing a crowd on any quay, &c., the property of the Commissioners, without permission in writing from the secretary. *L.*, without such permission, addressed a crowd of workmen on a quay, the property of the respondents, advising the workmen who were on strike to go back to work. *L.* was prosecuted by the Commissioners under the by-law. No direct evidence was given on behalf of the Commissioners that the permission of the secretary had not been obtained; but it was proved that *L.* had been warned previously against addressing meetings on the quay, and evidence was given of a statement by *L.* at the time of the alleged offence, that he knew that what he was doing was a violation of the by-law. *L.* having been convicted of an offence against the by-law:—*Held*, that the by-law in question was not repealed by sect. 2 of the Trade Disputes Act, 1906 (2), and that the conviction was right. *Held*, also, that there was evidence to show that the permission in writing of the secretary had not been given. *Held*, also, *per* Wright and Dodd, JJ., that the onus did not lie on the Commissioners to show that such permission had not been given. *Larkin, Appellant*; *Belfast Harbour Commissioners, Respondents* [APP. 214

CAMPBELL'S (LORD) ACT—Negligence of public Authority — Public Authorities Protection Act - - - - - 34
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CARGO — Discharge of — Custom of port — "Hoisting" or "whipping" - 482
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CASES—*Blundell* v. *Brettargh* (17 Ves. 232) distinguished - - - - - 143
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—— *M'Govern* v. *Finlay* (20 L. R. Ir. 189) distinguished - - - - - - 176
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—— *Mallinson* v. *Carr* ([1901] 1 Q. B. 48) followed - - - - - - 234
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—— *Pearson* v. *Corporation of Dublin* ([1907] 2 I. R. 537; [1907] A. C. 351) discussed and applied - - - 483, 507
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—— *Poirez* v. *Collum* ([1907] 1 I. R. 7) applied
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—— *R.* v. *Beardsall* (1 Q. B. D. 452) followed 155
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—— — (*Tighe*) v. *Mayo* (*County Council of*) ([1908] 2 I. R. 460) distinguished - - 170
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See JUSTICES. 4.

COSTS—*Second counsel—Arbitration—Question of law in issue—Discretion of Taxing Master—Difficulty and magnitude of case.*] In an arbitration on a claim to recover £100, the value for which an animal was insured, the insurers disputed liability on two grounds, one of which related to the meaning of a clause in the policy, while the other raised an issue of fact. At the hearing seven witnesses, three of whom were experts, were examined. The umpire awarded the full sum claimed, with costs. At the taxation of the costs the Taxing Master allowed the costs of a senior counsel, but disallowed the costs of a junior counsel, on the grounds that the case was comparatively unimportant, and that, in the circumstances in which the arbitration was held, only one counsel was necessary. On a motion to review the taxation of costs:—*Held*, by the King's Bench Division (Boyd, Kenny, and Wright, JJ.), that the Taxing Master had failed to appreciate the magnitude and difficulty of the case, and that the bill of costs should be remitted to him, with a direction to tax the costs of a junior counsel. *Held*, by the Court of Appeal, reversing the decision of the King's Bench Division, that, no question of principle being involved, the discretion of the Taxing Master should not be interfered with. *In re Arbitration between Small and The Scottish Live Stock Insurance Co.*

[K. B. 603; APP. 608

2. —— *Proceedings on behalf of the Crown — Mandamus*—9 & 10 *Vict. c.* 113, *s.* 5—18 & 19 *Vict. c.* 90.] The prosecutor obtained an order from the King's Bench, that a writ of mandamus should issue against the defendants; and the defendants appealed. Before the appeal came on for hearing the defendants gave notice to the prosecutor that they would not proceed with the appeal:—*Held*, that the prosecutor was not entitled to the costs incurred before receipt of the notice withdrawing the appeal. *The King* (*Postmaster-General*) v. *Great Northern Railway* - - - APP. 32

COUNSEL—Number of—Arbitration—Costs
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COUNTY COURT—Execution of decree—Misconduct of sheriff's bailiff - - 138
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CRIMINAL INJURY—*Decree awarding compensation—County Council—Financial year—Estimates—Local Government (Ireland) Act*, 1898, *sects.* 5, 80—*Public Bodies Order*, 1904—*Mandamus.*] On the 29th May, 1907, *B.* obtained an order of the County Court Judge awarding him compensation for criminal injury to his property on the preceding 7th March, to be raised off the county at large, which order was affirmed by the Judge of Assize on the 1st July, 1907, the amount of compensation being increased. In accordance with their practice under the Public Bodies Order, 1904, the County Council at a meeting on the 25th February, 1907, had considered and confirmed the estimates presented by the secretary for the financial year ending 31st March, 1908, in pursuance of which the necessary rates for that year were struck. On the 3rd December, 1907, *B.* obtained a conditional order for a mandamus, directed to the County Council and their treasurer (the *H.* Bank), commanding the latter, out of such moneys as were under its control, or, if same were insufficient, then out of the first moneys coming to its hands as treasurer, to pay to *B.* the amount of the decree and costs. Cause being shown, on the grounds that the Council were not empowered to pay sums awarded for criminal injuries out of the general funds of the county, levied and collected for other purposes of a public nature; that it was intended to provide for the sum awarded to *B.* in the estimates to be considered in February, 1908; and that to strike a special rate for the purpose at another period of the year would cause much expense and trouble:—*Held*, that the conditional order should be discharged. *Sullivan* v. *Giltrap* (2 New Ir. Jur. R. 212) followed, as to the inefficacy of the decree to create a liability immediately enforceable against the County Council as a debt. *Magovern* v. *Finlay* (20 L. R. Ir. 189) distinguished. *The King (Tighe)* v. *County Council of Mayo* (*ante*, p. 160) distinguished, on the ground that in the present case there was no possibility of including the amount awarded to *B.* in the estimates for the current financial year. *The King (Bennett)* v. *County Council of King's Co.* [K. B. 176

CRIMINAL LAW—Dismiss without prejudice — Subsequent prosecution for same offence—18 & 19 Vict. c. 126, ss. 1, 2
See JUSTICES. 5. [429

—— Fine—Apportionment of — Prosecution by School Attendance Committee 375, 380
See FINE.

—— Prosecution for misconduct at County Borough Election—Ballot papers and register—Inspection—Subpœna - - 155
See DISCOVERY.

—— Unsound meat—Possession—Exposure or conveyance for sale - - - 234
See MEAT.

CROSS-ACTIONS — Staying proceedings in second action - - - - 629
See STAYING PROCEEDINGS.

CROWN—Proceedings on behalf of—Costs 32
See COSTS. 2.

—— Prosecution by School Attendance Committee—Fines - - - - 375, 380
See FINE.

CUSTODIA LEGIS—Search warrant—Possession—Conversion - - - 69
See JUSTICES. 4.

CUSTOM OF PORT—*Ship—Discharge of cargo—"Whipping" or "hoisting"*] Judgments of the King's Bench Division and Court of Appeal, [1907] 2 I.R. 578, 602, affirmed by the House of Lords. *Gallaher, Appellant*; *Clydesdale Shipowners Company, Limited, Respondents* H.L. 482.

DEATH—Negligence—Lord Campbell's Act—Public Authorities' Protection Act 34
See NEGLIGENCE. 2.

—— Of party to arbitration before award—Continuing proceedings - - - 143
See ARBITRATION.

DECREE — County Court — Criminal injury — Financial year—Estimates - 176
See CRIMINAL INJURY.

—— County Court—Execution—Misconduct of sheriff's bailiff - - - - 138
See SHERIFF.

DEED—Separation - - - - 339
See SEPARATION DEED.

DELAY—In making title—Possession taken by purchaser—Interest - - 317
See INTEREST ON MONEY.

DISCOVERY—*Balloting papers—Local Government election petition—Inspection of documents—Form of order—Urban District Councillors and Town Commissioners (Ireland) Election Order*, 1898, *Schedule III., Article* 42.] In a petition against the election of councillors for an urban district, where no regulations have been prescribed

DISCOVERY—*continued.*
by the council of the county in which the urban district is situate as to documents in the custody of the returning officer, other than ballot papers and counterfoils, being open for public inspection, the Court will grant an absolute order for the inspection of such documents. *In re Pembroke U.D.C. Election Petition* - - K.B. 158

2. —— *Balloting papers—Prosecution for personation and improper dealing with ballot papers—Inspection, prior to trial—Subpœna to produce at trial, or any adjournment thereof—Form of order—Alderman and Councillors of County Boroughs (Ireland) Election Order,* 1898, *Schedule III., Articles* 40, 41, *and* 42.] A prosecution having been instituted against the presiding officer at a polling station during a county borough election for personation and other offences against the Ballot Act, 1872, as adapted by the Aldermen and Councillors of County Boroughs (Ireland) Election Order, 1898, the Court made an order directing the returning officer at the election to produce and show to the solicitor for the Crown rejected ballot papers, counted ballot papers, spoiled ballot papers, relating to the election, the counterfoils thereof marked by the presiding officer at the polling station, and the marked copy of the register used at the polling station. The Court also gave leave to issue a subpœna *duces tecum*, directed to the returning officer, to produce the said documents at the trial or any adjournment thereof. *R.* v. *Beardsall* (1 Q.B.D. 452) followed. *The King* v. *Quinlan* - - - - - - K.B. 155

3. —— *Individuals suing under the name of a firm—Form of order—R.S.C.I.* (1905, 22*nd February*), *Order XXXI., R.* 12.] Where individuals sue, or are sued, under the name of a firm, and an order for discovery of documents is made against them, it is not necessary that the order should specify the name of the individual to make discovery. *Herskind* v. *Hall* - - - - - K.B. 99

4. —— *Party resident abroad—Agent residing within the United Kingdom—Form of order—R.S.C.I.* (22*nd February*, 1905)—*Order XXXI., R.* 12.] In an action brought by a firm carrying on business abroad to recover the price of goods ordered through their agent in the United Kingdom, the defendants moved for discovery of documents:—*Held*, by Kenny, J., that the order should be made against the plaintiffs with liberty to their agent in the United Kingdom to make discovery on their behalf. *Donovan & Co.* v. *Todd Burns, & Co.* [K.B. 100

DISMISS WITHOUT PREJUDICE—Subsequent prosecution for same offence—Criminal Justice Act, 1855, ss. 1, 2 429
See JUSTICES. 5.

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DWELLINGHOUSE—Exclusive occupation—Easement - - - 329, 622
See PARLIAMENT. 2, 3.

—— Room in—Town—Notice of eviction 468
See PENALTY.

EASEMENT—Dwellinghouse—Franchise
See PARLIAMENT. 2, 3. [329, 622.

ECCLESIASTICAL LEASE — *Perpetuity — Variation of rent—Irish Land Act,* 1903 (3 *Edw.* 7, *c.* 37), *s* 90.] By lease, dated 14th September, 1789, *A*, who was sub-lessee of Church lands under the Archiepiscopal See of Dublin for fourteen years, with customary right of renewal, subdemised to *B* portion of the leasehold for fourteen years, at the rent of £5, with a covenant by *A* to use his best endeavours to procure renewals of his interest, and thereupon to execute and grant a renewal to *B* at a fine of £1 2*s.* 9*d.* By a grant in perpetuity, dated 22nd August, 1866 (pursuant to the Church Temporalities Acts), *A's* representatives granted the premises to *B's* representatives (trustees) at the rent of £5 3*s.*, "or such increased or diminished yearly rent as shall or may from time to time be substituted in the place or stead of the said hereby reserved yearly rent, pursuant to the provisions for the purpose in the said statutes in that behalf provided." The grant contained no stipulation for periodical revision:—*Held*, that the rent was not variable under the provisions of the 6 & 7 Wm. 4, c. 99, s. 2, and that the grant of 1866 could not be construed as containing a contract for variation; and, also, that *B's* representatives, being trustees, could not have entered into a valid contract for variation of the rent in the perpetuity grant to them of 1866 (*Poirez* v. *Collum*, [1907] 1 I. R. 7), and that *B's* representatives were liable for the full amount of the rent reserved in the sub-perpetuity. *Carson* v. *Jameson*, - - K.B. 308

ELECTION—*Petition—Irregularities in conduct of election—Non-compliance with prescribed Rules and Forms—Absence of corrupt or illegal practice by candidate—Principles of Ballot Act,* 1872 (35 & 36 *Vict. c.* 33)—*Case stated by Commissioner—Mandamus—Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *sect.* 93, *sub-sect.* 8.] At an election of fifteen members of an Urban District Council twenty-nine candidates were duly nominated. There were, prior to the opening of the poll, two supplemental ballot-boxes on the premises where the election was held, one in charge of a presiding officer, and one in the custody of the returning officer, which were not opened or shown to be empty before the opening of the poll, but each of which, before being brought into use when the other boxes were filled, was opened, shown to be

empty, and re-sealed. The returning officer did not count or record the number of ballot-papers in each box, or mix the whole of the ballot-papers before counting; but this was omitted with the approval and assent of the agents for all the candidates:—*Held*, that though these were breaches of the rules in Schedule I. to the Ballot Act, they did not violate any principle laid down in the body of the Act, and were not sufficient to avoid the election. The agent of the successful candidates lodged with the returning officer in due time a form of nomination, signed by eight of the candidates, naming ten agents for attendance on their behalf on the polling-day. The returning officer, in a circular to the candidates, stated that there were two polling-stations; but there were, in fact, ten tables, at which ballot-papers were given out and stamped by assistants, appointed by the returning officer, with the approval and being under the control of the officer presiding at each table. The unsuccessful candidates were informed of the nomination of the ten agents, and they requested the returning officer to allow them to appoint a like number, to which he agreed. They had, in fact, seven agents. The Commissioner who tried the election petition found, as facts, that the agent for the successful candidates, in nominating ten polling-agents, *bona fide* believed that he was entitled to do so; that the returning officer, in accepting the nomination, and in permitting each side to have ten agents, was actuated by a *bona fide* desire to convenience and facilitate all parties; and that all the arrangements made by the returning officer for the election were made by him with a *bona fide* desire to facilitate electors in voting, and to prevent confusion and delay, and in the Commissioner's opinion they did so operate. The Commissioner finally stated that he was of opinion, and so found as facts, the following—(*a*) At the polling every elector who attended had full opportunity of recording his or her vote. (*b*) The election was conducted in accordance with the principles contained in the body of the Ballot Act, 1872, and of the Local Government (Ireland) Act, 1898. (*c*) If any of the matters complained of by the petitioners were or was a non-compliance with, or a non-observance of, or a departure from, any of the requirements of or under the rules or the forms in the Schedule to the Ballot Act, 1872, or of or under the rules of the Election Order of the 22nd December, 1898, the same or any of them did not in any way affect the result of the said election:—*Held*, by Palles, C.B., that the validity of the election must be determined on the basis that there were only two polling-stations, and therefore the nomination was contrary to Rule 17 of the Local Government Board's Election Order of the 22nd January, 1898. *Held*, further, by

Palles, C.B., and Dodd, J. (who, however, did not make it the basis of his judgment), that this Order was *ultra vires*, as being contrary to section 24 of the Ballot Act, 1872. *Held*, further, by Palles, C.B., that although the presence of a number of agents in excess of the number allowed by section 13 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 77), was contrary to the principles of that Act, and to the rules in the Schedule to the Ballot Act, it was not contrary to any principle laid down in the body of the Ballot Act, and that, consequently, the election could not, on that ground, be declared void, if the illegality be excused by the Commissioner. *Held*, by Johnson, J. (in whose judgment Wright, J., concurred), that having regard to the findings of the Commissioner, notwithstanding the admitted irregularities, the election was conducted in accordance with the principles laid down in the body of the Ballot Act and the Election Order, 1898, and that therefore the election ought not to be declared irregular and void. *Held*, by Dodd, J., that if Rule 17 of 22nd December, 1898, was *intra vires*, it must receive a reasonable construction. Its hypothetical object, to prevent the polling-station being crowded and to limit expense, could only be justified if there remained an adequate check on possible breaches of the Ballot Act by an adequate number of agents; that the candidates were within their rights in demanding proper inspection and proper agents for their own protection and the proper carrying out of the Act; and, from the candidates' point of view, there being ten polling-stations—the number of agents nominated was rendered necessary by the conduct of the returning officer, and was, in fact, a necessary precaution; and that therefore the question put by the Commissioner—whether, under the circumstances, the election should be declared invalid and void—should be answered in the negative. Where, at the trial of a Local Government Board election petition, the Commissioner states a case for the opinion of the Court, under sect. 93, sub-section 8, of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), he cannot be compelled by mandamus to determine any particular questions of fact, or to amend the case stated by including therein his determination of any particular facts. *Query*: Does mandamus lie to the Commissioner appointed for trial of a Local Government petition? *In re Pembroke Election Petition* - - K.B. 433

—— Ballot papers—Inspection - - 155
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—— Documents other than ballot papers—Inspection - - - - - - 158
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ENDOWED ACADEMY—*Educational Endowments (Ireland) Act*, 1885—*Scheme—Governors—*

ENDOWED ACADEMY—*continued.*
Special meeting—Quorum—Professor or teacher—Appointment and dismissal of.] A statutory scheme, forming the constitution of an Academy endowed with public funds, contained the following provisions:—Clause 39: "No professor or teacher shall be dismissed during his term of office except upon a resolution of a special meeting of the Governors, passed after due notice." Clause 34: "Every Governor shall, at or before the first meeting which he attends, sign a declaration . . . of his acceptance of the office of Governor; and until he has signed such declaration he shall not be entitled to act as Governor." The plaintiff had been appointed a professor of the Academy under a contract made subject to the provisions of the scheme, and terminable by three months' notice on either side. The plaintiff was given a three months' notice to terminate his contract, which notice was passed at an ordinary meeting of the Governors. The plaintiff disregarded the notice; and, on attending as professor at its expiration, was expelled from the Academy by one of the Governors, whose action was subsequently adopted by an ordinary meeting of the Governors. The plaintiff then brought an action against the Academy for wrongful dismissal. At the trial the plaintiff contended that the notice to terminate his contract was invalid—(*a*) because it was not passed at a "special meeting"; and (*b*) because there was not present at the meeting a quorum of Governors qualified under clause 34. It was proved that this latter objection applied also to the meeting which sanctioned the plaintiff's contract, and to the meeting which adopted his expulsion:—*Held*, first, that the plaintiff's appointment was valid and could not be questioned; secondly, that clause 39 had reference only to a dismissal in defeasance of the contract, and not to a notice in accordance with its terms, and that the omission to summon a special meeting did not invalidate the notice; thirdly, that as the plaintiff denied the capacity of the Governors to act on behalf of the Academy in terminating his contract, he was estopped from relying on their resolution adopting his expulsion as evidence to render the Academy liable for it, since the same objection could be urged with equal force against the validity of the acts of either meeting. *Woodhouse* v. *Royal Irish Academy of Music* - - - - K.B., 357

ESTIMATES—Financial year—County Council
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EVICTION—Non-service of notice—Room—Premises in a town - - - 468
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EVIDENCE—Appeal to Quarter Sessions from refusal of Justices to renew spirit grocer's license - - - - 124, 137
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—— Lost writing—Photograph—New trial 194
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—— Misdescription of legatee - - 370
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—— Negligence—Railway Company 242, 270
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EXCLUSIVE OCCUPATION — Dwelling-house—Right of passage—Franchise
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FENCE—Railway—Defective condition—Negligence - - - - 242, 270
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FINANCIAL YEAR — Estimates — County Council - - - - - 176
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FINE—*Irish Education Act*, 1892 (55 & 56 *Vict. c.* 42), *sect.* 3, *sub-sect.* 5—*School Attendance Committee—Revenue from penalties—Amount of penalty applicable in relief of local rate—Fines Act (Ireland)*, 1851 (14 & 15 *Vict. c.* 90), *sect.* 13—*Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 22, *sub-sect.* 8.] Section 3 of the Irish Education Act, 1892, creates a School Attendance Committee, and sub-section 5 provides that the expenses of the Committee shall be defrayed out of the local rate; "but any revenue from penalties in the place or district shall be applied in relief of the local rate":—*Held*, by the King's Bench Division and the Court of Appeal, that where, on a prosecution by a School Attendance Committee for an offence against the Act, a fine is imposed, the Committee are not entitled to have paid to them the whole amount of the fine for the purpose of being applied in relief of the local rate, but only such portion as the Justices may award to them under section 13 of the Fines Act (Ireland), 1851, or section 22, sub-section 8, of the Petty Sessions (Ireland) Act, 1851—that is to say, a sum not exceeding one-third of the fine, the remainder being payable to the Crown. *The King (County Council of Co. Dublin and School Committee of South Dublin R.D.C.)* v. *Keating* - K.B., 375; APP. 380

FIRM—Arbitration—Death of partner—Continuing proceedings - - - 143
See ARBITRATION.
—— Discovery of documents—Form of order
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FRANCHISE—Parliamentary - 321, 329,
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FRAUD—On Statute - - - - 46
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GAMING—User of premises as betting-house
See BETTING-HOUSE. [411

GENERAL DEALER—3 *Edw.* 7, *c.* 44, *sect.* 2, *sub-sect.* 2 (b)—*Entry of name and place of abode of person from whom article purchased—False name and abode given by seller—Liability of general dealer*—Mens rea.] A general dealer is bound to enter the *true* name and place of abode of the person from whom he purchases an article, otherwise he is guilty of an offence under section 2 of the General Dealers (Ireland) Act, 1903, and it is no answer that he entered the name and place of abode given by the seller, and had no reason to believe they were not the true name and abode. *Toppin, Appellant*; *Marcus, Respondent* K.B. 423

GOVERNORS—Endowed Academy — Special meeting—Quorum - - - 357
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GRAND JURY—Presentment—Repair of road—Evidence - - - - - 101
See ROAD.

GRATUITY—To public employee—Receiver
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GUARDIANS—Poor Law—Dispensary doctor—Contract of service—Workmen's Compensation Act, 1906, s. 13 - 609
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GUTTER—Dangerous condition of—House adjoining public highway - 393, 402
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HARBOUR—By-law—Picketing—Permission in writing—Evidence - - - 214
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HIRING AGREEMENT—Furniture in dwelling-house—Bankrupt - - 612
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HOUSE—Dangerous condition—Adjoining public highway—Injury to passengers 393, 402
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HOUSEHOLD FURNITURE—Hiring agreement - - - - - - 612
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HUSBAND AND WIFE—Separation deed—Alimony—Adultery - . - 339
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ILLEGALITY—Admission of evidence—Photograph—Handwriting - - 194
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—— Admission of evidence—Quarter Sessions—Appeal from Justices - 124, 137
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ILLEGALITY—*continued.*

—— Proceedings before Justices - - 69
See JUSTICES. 4.

INCONSISTENT FINDINGS OF JURY—*Defamation — Libel — Slander — Innuendoes — Privilege — Fair comment — Finding of Jury — Perverseness — Trial — Practice.*] The Corporation of Dublin, in contemplation of a drainage scheme for the Clontarf district, advertised for tenders for the work. The majority of the Corporation rejected the lowest tender and accepted the next lowest, sent in by the plaintiffs. They were mainly influenced in doing so by representations made by the plaintiffs, that the ironwork in connexion with the undertaking would be wholly done at a foundry in Dublin, for which they had started a joint-stock company. One member of the Corporation and a relative of another were shareholders in this company. It turned out, however, that a large portion of the ironwork could not be executed in this foundry, and should be manufactured in England. It may be furthermore taken as admitted for the purpose of this report that inferior pipes were sought to be substituted by the plaintiffs for those described in the specifications. The defendant, a member of the Dublin Corporation, (*a*) wrote a letter to the Local Government Board, which he published in the Press; (*b*) and (*c*), made speeches in the Council Chamber, and (*d*) wrote a letter to the Press, which, together, constituted the defamatory matter for which the present action was brought. Letter (*a*) contained the following words, relied on in the statement of claim, paragraph 10:—"It is easy to understand how the Council was induced by a large majority to adopt this report," *i.e.*, that of the Improvements Committee, "the result of which is to put a tax of £1250," *i.e.*, the difference between plaintiffs' and lowest tender, "on the already sorely burdened ratepayers. If the statement be correct, I do not see the possibility of any efforts, however strenuous, being successful in narrowing the way that leads to corruption. On the contrary, your action will have the effect of broadening it." In paragraph 11 an innuendo was put on these words, that they meant that the plaintiffs were guilty of corruption and dishonesty in endeavouring to procure the contract. The speech (*b*), as partially stated in paragraph 4, after making a charge about the inferiority of the pipes, whereby the plaintiffs, it was alleged, would have made close on £2000, proceeded:—"It was not more than a month ago that the junior partner of that firm" (meaning the plaintiffs) "was charged with attempting to corrupt a member of that body by offering him a bribe of £50. . . . All knew how eloquently their" (the plaintiffs') "case was put forward by Alderman *J.*, and they knew something about Alderman *F.*'s advocacy. Both gentlemen were

INCONSISTENT FINDINGS OF JURY—*continued.*

pecuniarily interested. We are unfortunately connected with men" (the plaintiffs) "charged with deliberate corruption. It was a very hard thing to give a contract into the hands of a man who had made no attempt to clear himself of the charge. Another gentleman had been deliberately charged with taking this bribe, and that gentleman was sitting in the Council at the present time." The innuendoes upon this were—(i) (paragraph 5) that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct, and were guilty of bribery and corruption, and were unfit persons to be employed as contractors; and (ii) (paragraph 6) that the plaintiffs had been guilty of a criminal offence, punishable by imprisonment. The speech (*c*) (paragraph 7) was practically a repetition of (*b*), with additional details as to the question of the pipes. It contained the words, "They" (meaning the plaintiffs) "have never been willing, as honourable and honest contractors, to carry out the conditions of the contract"; and then suggested the necessity of a sworn inquiry. Innuendoes (i) (paragraph 8) that the plaintiffs had been guilty of fraudulent and dishonest practices and conduct; (ii) (paragraph 9) that they were guilty of bribery and corruption, and of a criminal offence, punishable by imprisonment. Letter (*d*) contained the following, relied on in paragraph 12:—"The members of the Council, if there be any, who are willing to champion a job of this kind should, at the first opportunity, be turned right-about-face, and receive such a parting kick—I speak metaphorically, of course—as they would feel and remember for the balance of their earthly existence." Innuendo (paragraph 13), that the plaintiffs' contract with the Corporation was a corrupt and disgraceful job. In addition to traverses, the defendant pleaded, as to the speeches, that the words were not defamatory, and privilege (upon which, however, except as to the pipes, no question arose, there being, as the Judge held, no evidence that the defendant believed in the truth of the charges other than as regards the pipes). As to the letters, he pleaded "No libel," privilege, fair comment, and justification in the ordinary signification of the words. The jury found the publication of both speeches and both letters; that the words relating to the drainage pipes, but not the others, were spoken in relation to the profession and business of the plaintiffs as contractors, and that the letters were written of and concerning the plaintiffs. They found that the words relating to the drainage pipes were privileged. As to letter (*a*), they found in favour of the innuendo, but found no libel: privilege; fair comment; and justification in the natural and ordinary signification of the words. As to speech (*b*), they found

INCONSISTENT FINDINGS OF JURY—*continued.*

in favour of innuendo (i), but against innuendo (ii). As to speech (*c*), they found in favour of innuendo (i), but against innuendo (ii). As to letter (*d*), they found in favour of the innuendo, but found no libel; privilege; fair comment; and justification in the natural and ordinary signification of the words. The Judge at the trial, holding this to be a verdict for the defendant, entered judgment for him. The judge was of opinion that the jury thoroughly understood the cause of action, the questions submitted, and the charge, and that there was nothing to indicate perversity in their conduct. The plaintiffs having moved for a new trial, on the grounds, *inter alia*, that the jury did not correctly understand or appreciate the questions submitted to them, and counsel in argument contending that the answers were inconsistent and repugnant:—*Held*, by the King's Bench Division (Lord O'Brien, L.C.J., and Madden, J.; Gibson, J., *diss*), that the verdict for the defendant should stand. *Held*, by Lord O'Brien, L.C.J., that letter (*a*), read as a whole, was incapable of being a libel on the plaintiffs; further, that the finding of the jury on the plea of justification, in the ordinary sense and signification of the words, was right in form, simple in language, and absolutely correct. As to the oral slanders, the findings in favour of privilege with regard to the charges about the pipes disposed of the question; and as to letter (*d*), on reading the whole of it, the alleged libel was of a very mitigated type, and was answered by the finding on the plea of justification, which there was, in his Lordship's opinion, ample evidence to sustain. In such a case, where the verdict is obviously honest and well considered, and approved of by the Judge at the trial, the Divisional Court should be astute to render the findings consistent. *Per* Gibson, J. (admitting that there were no grounds for attributing perversity to the jury), the findings, except as regards speech (*c*), were so contradictory and uncertain, that a new trial could not be avoided. *Per* Madden, J.: Though some of the findings were unsatisfactory, they did not support any allegation of perverseness on the part of the jury, or misunderstanding of other issues in the case, or affect the result of the trial, and that a re-trial was therefore unnecessary. The judgment of the King's Bench Division was affirmed by the Court of Appeal. *Crawford and Frame* v. *Vance*

[K.B. 521; APP. 581

INFANT—*Poor Law—Pauper child—Registration of religion*—Religio sequitur patrem—*Mandamus to alter register—Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56), *s.* 49.] The provisions of section 49 of the Poor Relief (Ireland) Act, 1838, are administrative merely, and do not dis-

INFANT—*continued.*
place the general rule that the religion of the father is to be imputed to his infant children. A boy of about eleven years of age, both of whose parents were dead, was placed by his maternal grandmother in the Union workhouse, and there, on her statement that he was a Protestant, registered as such. The father of the boy had been a Roman Catholic. His mother had been originally a Protestant. On her marriage she became a Roman Catholic, but on her husband's death she reverted to the Protestant religion. *B.*, one of the Guardians of the Union, applied to the Board of Guardians on behalf of *M.*, an uncle of the boy, and a Roman Catholic, to have the custody of the boy given to *M.*, but a difficulty arose as to granting the application, owing to the boy being registered as a Protestant. There was no evidence that the father had abandoned his right to have the boy brought up in his own religion, or that the boy had acquired settled religious convictions as a Protestant. An application having been made by *M.* and *B.* for a writ of mandamus to have the register amended and the boy registered as a Roman Catholic:—*Held*, that the register should be so amended; and *Held*, by Lord O'Brien, L.C.J., and Gibson, J., that either *M.* or *B.* had sufficient *locus standi* to apply for the writ of mandamus. *Held*, by Kenny, J., that *B.* had sufficient *locus standi* for the purpose. *The King* (*M'Conway and Byrne*) v. *Guardians of Belfast Union*; *In re M'Conway* - K. B. 343

—— Trespasser—Railway Company—Negligence
See NEGLIGENCE. 3. [242, 270

INHABITANT OCCUPIER—Void sub-letting—Franchise - - - - - 335
See PARLIAMENT. 4.

INNUENDO—Findings of jury - 521, 581
See INCONSISTENT FINDINGS OF JURY.

INQUIRY AGENTS—Report—Privilege—Malice - - - - - 483, 507
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INTEREST ON MONEY—*Vendor and purchaser—Lease upon payment of a fine—Delay—Possession taken pending completion—Liability for interest from date of possession.*] Where a tenancy created *de novo* is sold, and the purchaser takes possession in anticipation of title being made (which title he afterwards accepts), the tenant, notwithstanding that the vendor is in default in making title, cannot rely on payment of rent in respect of the tenancy as a defence to the vendor's claim for interest on the purchase-money from the date of the assumption of possession. *Beresford* v. *Clarke* - - - - - GIBSON, J., 317

IRREGULARITIES — Local Government Election—Not infringing upon principles of Ballot Act, 1872—Absence of corrupt or illegal practice by candidate - 433
See ELECTION.

JUDGMENT—Motion for—Amendment of writ—Service - - - - - 56
See SPECIALLY INDORSED WRIT.

JURISDICTION—Justices.
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JURY—Inconsistent findings - 521, 581
See INCONSISTENT FINDINGS OF JURY.

JUSTICES—*Lunacy* (*Ireland*) *Act*, 1867 (30 & 31 *Vict. c.* 118), *s.* 10—*Lunatic Asylums* (*Ireland*) *Act*, 1875 (38 & 39 *Vict. c.* 67), *s.* 14—*Order of Justices—Reasonable remuneration to medical officer—Reasonable expenses—Certificate of order—Stamp—Petty Sessions Clerks* (*Ireland*) *Act*, 1858 (21 & 22 *Vict. c.* 100), *s.* 14; *Sch. C.*] Justices made an order on the Guardians of the Union, under sect. 14 of the Lunatic Asylums (Ireland) Act, 1875 (2), for payment to a medical officer of the sum of £2 as reasonable remuneration for his "loss of time and professional service" in examining a lunatic. At the time the order was made the Justices were aware that expenses had been incurred by the police in the conveyance of the lunatic. *Held*, that the order was bad, inasmuch as it awarded compensation to the medical officer for loss of time as well as for professional services:—*Held*, by Lord O'Brien, L.C.J., and Wright, J. (Madden, J. *diss.*), that the "other reasonable expenses" referred to in the section are not confined to expenses of the medical officer, but would include expenses of the police incurred in connexion with the conveyance of the lunatic prior to his committal. *Held*, that a certificate of an order made under the section is not "certificate of order" within Schedule C. of the Petty Sessions Clerks (Ireland) Act, 1858, and does not require a stamp. *King* v. *Guardians of Delvin Union* - - K.B. 15

2. —— *Order authorizing road contractor to enter lands—Route to enter prescribed—Limit of time—Orchard—"Orcharding out" contractor—Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.] Justices, in making an order under section 162 of the Grand Jury Act, 1836, authorizing a road contractor to enter upon lands to raise stones, have no jurisdiction to prescribe a route by which the contractor must enter, and an order containing a provision to that effect is bad. An order authorizing a road contractor to enter upon land is not bad merely because the right of entry is given during a period of several years. *Semble*, *per* Lord O'Brien, L.C.J., there is no jurisdiction to make an order to enter on lands which are in fact an orchard, even though the owner may have turned them into an orchard for the purpose of ousting the jurisdiction of the Justices. *The King* (*Coyle*) v. *Justices of County Monaghan* K.B. 1

3. —— *Order authorizing entry on lands to take road materials—Signature—Decision of Justices that the lands are not an orchard not conclusive—Certiorari—"Orcharding out"—Bias—Grand Jury*

JUSTICES—*continued.*

(*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.] It is a condition precedent to the jurisdiction of Justices to make an order under sect. 162 of the Grand Jury (Ireland) Act, 1836, authorizing entry on lands to take road materials, that the lands are not an orchard; and their decision that it is not an orchard may be challenged on *certiorari*, not merely on the ground that there was no evidence to support it, but also with reference to the weight of evidence. There is no jurisdiction to make an order under the section where the lands are, in fact, an orchard, even though the owner may have turned them into an orchard for the purpose of ousting the jurisdiction of the Justices, at least where this has been done before a Justice's order has been made or sought for. *Per* Gibson, J.: An order made under the section should be signed by all the Justices who made it. The chairman of a County Council and another member of the Council who had taken an active part in promoting and carrying a resolution of the County Council, that their county surveyor should apply at Petty Sessions for an order authorizing him to enter certain lands and take road materials, were Justices of the county, and took part with the other Justices at Petty Sessions in adjudicating on an application made by the county surveyor, pursuant to such resolution, notwithstanding objection made on behalf of the owner of the lands, who opposed the application on the ground that the lands were an orchard, and also on the ground that the road materials could be conveniently procured elsewhere. The application was granted, and an order made accordingly:—*Held*, that the order must be quashed on the ground of bias. *The King* (*De Vesci*) v. *Justices of Queen's County*. K.B. 285

4.——*Search-warrant—Delivery of possession—Trover and conversion—Court of Summary Jurisdiction*—Coram non judice—*Possession*—Custodia legis—60 & 61 *Vict. c.* 30, *s.* 1—12 *Vict. c.* 16, *s.* 2.] In the course of a family dispute as to the ownership of a farm, *Q.* and others, who were living in the house on the farm, reaped and stored in a room in the house a quantity of barley which had been sown by *B.*, whereupon *B.* swore an information to the effect that *Q.* and the others had stolen the barley, on which Captain *S.*, a Justice, issued a search-warrant. Upon the barley being found in the house, *Q.* and the others were arrested by the police, and brought before Captain *S.* and Major *P.*, Justices, sitting in the day-room of a police barrack, and were returned for trial. Afterwards, in the absence of *Q.* and the others, the two Justices, purporting to act under 60 & 61 Vict. c. 30, s. 1, made an order to the police, who had taken possession of the barley, to deliver it to *B.*, which was done:—*Held*, that the two Justices, sitting in the day-room of the police barrack, were not a "Court of Summary Jurisdiction" for the purposes of this section; the proceeding, in which the order to deliver the barley was made, was, therefore, *coram non judice*: and their act in making the order was one within 12 Vict. c. 16, s. 2, which entitled *Q.* to maintain an action against the Justices without proof of malice. *Held*, also, that there was no jurisdiction to make the order without the parties interested being present or summoned to attend. *Held*, also, that the seizure of the barley under the search-warrant, and the *custodia legis* thereby established, did not deprive *Q.* of a possession of the barley sufficient to entitle him to maintain an action of trover against the Justices. *Quinn* v *Pratt* - - K. B. 69

5. —— *Summary Jurisdiction—Larceny—Dismiss without prejudice—Subsequent prosecution for same offence—Criminal Justice Act*, 1855 (18 & 19 *Vict. c.* 126), *ss.* 1, 12.] The respondent was charged before Justices at Petty Sessions with larceny of property not exceeding in value five shillings, and consented to the Justices hearing the case, as provided by 18 & 19 Vict. c. 126. The Jutices heard the case, and made an order dismissing the charge "without prejudice," and gave the respondent a certificate under their hands of such dismissal:—*Held*, that the dismiss, although expressed to be without prejudice, was a bar to a subsequent prosecution for the same offence. *Great Southern & Western Railway Co., Appellant*; *Gooding, Respondent* - - K.B. 429

6. —— *Summary jurisdiction — Prosecution by constable under Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Service of summons—Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 12, *sub-s.* 2.] *M.* was charged on summons, on the complaint of a constable of the Royal Irish Constabulary, with an offence under sect. 6 of the Sale of Food and Drugs Act, 1875. The summons was served by another constable, by the direction of the Justice who issued it:—*Held*, that the service was bad, inasmuch as a prosecution under the section in question, though a constable is the complainant, is not a case of an offence prosecuted by the constabulary within the meaning of sect. 12, sub-sect. 2, of the Petty Sessions (Ireland) Act, 1851, and the power given by such sub-section to the Justice issuing the summons to direct, in cases of offences other than those prosecuted by the constabulary, service by a person other than the summons-server of the district, does not authorize the Justice to direct service in such cases by a constable. *Hannam, Appellant*; *Morrissey, Respondent* - - - K.B. 9

—— Licensing Acts—Renewal—Appeal—Quarter Sessions — Majority — Poll — Evidence

See LICENSING ACTS. [124, 137

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—— Public Health Act, 1878—Possession of unsound meat—Summons - - 234
See MEAT.
—— School Attendance Committee—Prosecution by—Fine—Application in relief of local rates - - - - - 375, 380
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JUSTIFICATION—Of words in their natural and ordinary signification—Innuendo—Inconsistent findings - 521, 581
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LAND LAW (IRELAND) ACTS—*Landlord and tenant—Purchaser—Arrears of rent—Evasion of statute—Promissory note—Land Law (Ireland) Act*, 1896, *s.* 35—*Irish Land Act*, 1903, *s.* 24 (8).] A tenant purchasing under the Irish Land Act, 1903, owed two years' arrears of rent, one of which was to be paid out of the purchase-money, under section 24 (8) of the Act; and, as to the other year's arrears, it was agreed between the agent and the tenant that the agent should pay the amount thereof to the landlord, and should take from the tenant and a surety a promissory note for the amount, which note was of even date with the purchase agreement. The agent on the next day discounted the note at the bank, and subsequently paid the amount to the landlord. Before the maturity of the note the tenant made a payment on account, but afterwards failed to pay the balance when due, and the agent now sued the surety for the amount:—*Held*, by Lord O'Brien, L.C.J., and Gibson, J. (Kenny, J., *diss.*), that the agreement, being intended as a contrivance to evade the scope and policy of the 35th section of the Land Law (Ireland) Act, 1896, was without consideration, and the balance due on foot of the note could not be recovered. *Nash* v. *Neazor* - - K.B. 46

—— Sub-letting without consent — Occupation without legal title—Franchise - 335
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LANDLORD AND TENANT — Eviction — Non-service of notice on relieving officer —Room—Premises in a town - 468
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See LAND LAW (IRELAND) ACTS.
—— Tenancy created *de novo*—Fine—Title—Interest on purchase-money - 317
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LARCENY — Summary procedure — Dismiss without prejudice—Subsequent prosecution - - - - - - 429
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LEASE—Ecclesiastical—Variation of rent 308
See ECCLESIASTICAL LEASE.
LEGATEE — Misdescription—Correction—Probate - - - - - - 370
See PROBATE.

LIBEL — *Privilege — Malice — Evidence of — Principal and agent—Malice of agent, how far affecting principal—Publication—Inquiry agents—Credit of tradesmen—Company furnishing reports as to credit for reward—Condensation of report received from agent.*] The defendants, *K. & Co.*, were an incorporated Company, carrying on the business of mercantile inquiry agents, and having their head offices in London. For the purposes of their business they divided the United Kingdom into districts, having a manager and a number of local correspondents in each district. Clients of *K. & Co.* requiring information filled up printed inquiry forms (supplied by *K. & Co.*) regarding the solvency and commercial standing of the person about whom information was sought, and the inquiry was answered in strict confidence by *K. & Co.*, after obtaining a report from their local correspondent in the locality where such person carried on business. *K. & Co.* were paid at a fixed rate for each inquiry, and paid a fixed proportion of each fee so received by them to the correspondent to whom they applied for information. This was the sole remuneration which they gave to their local correspondents. The local manager for *K. & Co.* at Belfast was *A.*, and their local correspondent at Dromore, in the "district" of Belfast, was *D.* In response to an inquiry about the plaintiff by a client of *K. & Co.*, *A.* applied to *D.*, who made an unfavourable report. *A.* condensed *D.*'s report and forwarded it to the client. In an action against *D.* and *K. & Co.*, jointly and severally, for libel, the libel pleaded being the report as condensed by *A.*, and sent by him to the client, the jury found —(1) that the document was libellous; (2) that it was published by *K. & Co.*, and by *D.*; (3) that there was malice by *K. & Co.* on the part of *D.*, but not on the part of *A.*; (4) that there was malice by *D.* Upon a motion for a new trial:—*Held*, in the King's Bench Division—(1) that the occasion was privileged; (2) (Boyd, J., *dub.*) that *K. & Co.* were liable for the malice of their local correspondent, *D.*; (3) (Johnson, J., *diss.*) that there was no evidence of publication by *D.* *Held* by the Court of Appeal, that the plaintiff was entitled to judgment against both *K. & Co.* and *D.* *Pearson* v. *Corporation of Dublin* ([1907] 2 I. R. 537; [1907] A. C. 351) discussed and applied. *Fitzsimons* v. *Duncan and Kemp & Co.*
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—— Evidence—Photograph—Comparison of handwriting - - - - - - 194
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—— Fair comment — Privilege — Innuendoes — Findings of jury—Inconsistency
[521, 581
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LICENSING ACTS — *Spirit grocer and beer retailer—Peaceable and orderly manner—Renewal*

LICENSING ACTS—*continued.*
of license—Refusal—Objection—Appeal — Entering upon other grounds—Illegal evidence—Jurisdiction —Licensing Act, 1855 (18 & 19 *Vict. c.* 62), *s.* 2—*Justices — Majority — Poll.*] A spirit grocer and beer retailer, who had been once convicted during the previous twelve months, being refused a renewal certificate by the Justices at the Annual Licensing Sessions, upon the ground that her house "had not been conducted in a peaceable and orderly manner during the past year," appealed to the Quarter Sessions. Section 2 of the Licensing Act of 1855, which gives the right of appeal, provides that, upon the hearing of the appeal, "no other grounds shall be entered upon except such as shall be stated in the order of refusal." Her solicitor urged upon the Chairman and Justices the hardship of depriving her of her license for one conviction, whereupon the Chairman elicited from the police witness that, besides the one conviction within the twelve months, she had been five times previously convicted. At the close of the case the Chairman refused to take a poll of the Justices (of whom there were twenty-five present), stating that they were unanimous; but, upon two Justices stating that they were for reversing the order of the Petty Sessions, the Chairman called upon those who were for reversing to stand up. Nine Justices signified their opinion in favour of reversing by standing up, whereupon the Chairman, without calling upon those who were in favour of affirming to formally signify their opinion, declared that a large majority of the Justices were for affirming the order of the Petty Sessions:—*Held*, by the King's Bench Division and the Court of Appeal, that the evidence as to the five convictions having been elicited by the Chairman for the purpose of removing the false impression created by the statement that there was only one conviction against the applicant, did not violate the provision that no other grounds should be entered upon except such as should be stated in the order of refusal. *Quære*: Whether, in a case where there was legal evidence to support the order of the Quarter Sessions—viz., the one conviction within the year, the admission of illegal evidence in addition would oust jurisdiction?—*Held*, also, that the method adopted by the Chairman of taking the opinion of the Justices was both legal and adequate. *The King* (*Quinn*) v. *Chairman and Justices of Tyrone* K.B. 124; App. 137

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—— Sub-sheriff—Re-appointment—Liability for bailiffs' misconduct—27 & 28 Vict. c. 99, s. 5 - - - - - - 138
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—— County Council—Compensation for criminal injury—Financial year—Estimates [176
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—— County Council — Contractor — Repair of road—Orchard - - - 1, 285
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—— County Council—Rural District Council—Repair of road—Evidence—Expenditure —Excess of limit - - - 101
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—— Election — Urban District Council—Irregularities—Ballot Act, 1872 - 433
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—— Public Health Act—Unsound meat - 234
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LOST DOCUMENT—Photograph—Comparison of handwriting—New trial—Appeal 194
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LOST WRIT—*Practice—Procedure—Loss of an original writ—Leave to seal and serve a copy—Mode of application—R. S. C., I.* (1905, 22*nd February*), *Ord. VIII., R.* 3.] Where a writ has been lost or destroyed, and an order is sought that a copy of such writ shall be sealed and served in lieu of the original, the application may be made by motion *ex parte*. *M'Collum* v. *Faul* K.B. 98

LUNATIC — Dangerous — Temporary detention as — "Dependant" — Workmen's Compensation Acts - - - 84
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—— Examination of—Medical officer—Remuneration - - - - - - 15
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MAIMING—Peace officer—Compensation 61
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MALICE—Privilege—Principal and agent 483, [507
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MANDAMUS—Compensation for criminal injury —Decree — Estimates — Financial year [176
See Criminal Injury.

—— Costs—Proceeding on behalf of the Crown [32
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—— County and Rural District Councils — Demand and refusal—Repair of road 101
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—— Local Government election — Commissioner for trial of petition—Case stated 433
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—— Register of Workhouse—Religion of infant—Prosecutor - - - - 343
See Infant.

MASTER AND SERVANT—Endowed Academy—Professor—Dismissal - 357
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—— Negligence—Misconduct of fellow-servant 91
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MASTER AND SERVANT—*continued.*
—— Workmen's Compensation Act—Dependency —Dangerous lunatic - - 84
See WORKMAN.

MEAT—*Local Government—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 132, 133 —*Possession of unsound meat in slaughter-house —Preparation of carcase for human food—Exposure or conveyance for sale—Summons.*] If unsound meat, unfit for human food, is found in the slaughter-house of a butcher, being dressed and prepared for sale as human food, and is seized by the officer of the Local Sanitary Authority, condemned by a magistrate, and ordered to be destroyed, and is destroyed accordingly, the butcher is liable to a penalty, under the Public Health Act, 1878, ss. 132, 133, on the complaint of the Sanitary Authority, although it is neither alleged in the summons nor proved at Petty Sessions that such meat was being exposed or conveyed for sale. *Mallinson* v. *Carr* ([1891] 1 Q.B. 48) followed. *Firth, Appellant; M'Phail, Respondent* ([1905] 2 K.B. 300), distinguished. It is immaterial that the disease could only be detected on killing the animal, and that the carcase was seized immediately upon slaughter. *Cork Rural District Council* v. *Walsh; Same* v. *Desmond* [K.B. 234

MEDICAL OFFICER—Examination of lunatic —Remuneration — Order of Justices—Loss of time - - - - - 15
See JUSTICES. 1.

MEETING—Special — Governors of Endowed Academy—Quorum—Dismissal of professor - - - - - - 357
See ENDOWED ACADEMY.

MENS REA—Entry of seller's name and place of abode—General Dealers Act, 1903, s. 2, sub-s. 2 (b)—Innocent misstatement 423
See GENERAL DEALER.

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See PROBATE.

MOTION—For judgment—Writ—Amendment—Service - - - - - - 56
See SPECIALLY INDORSED WRIT.

NEGLIGENCE—*Nuisance — Highway—Owner of adjoining house—Gutter falling from roof.*] The plaintiff was injured by a piece of the gutter from the roof of the defendant's house falling on her as she was passing along the street. The fall of the gutter took place owing to a screw having rotted. Evidence was given on behalf of the defendant that workmen had been periodically employed to examine and repair the gutter. There was no evidence that the defendant knew of its defective condition. The jury found that there was no want of reasonable care on the part of the defendant in maintaining the gutter, and that its fall was not occasioned by neglect or

NEGLIGENCE—*continued.*
default on his part, and thereupon, by direction of the Judge, found a verdict for the defendant:— *Held*, that the defendant was entitled to retain the verdict. *Tarry* v. *Ashton* (1 Q. B. D. 314) distinguished. *Palmer* v. *Bateman* [K. B. 393; APP. 402

2. —— *Personal injury—Death of person injured —Action by widow more than six, but within twelve, months from the date of the accident—Statute of Limitations—Public Authority, action against—Lord Campbell's Act* (9 & 10 *Vict. c.* 93) *—Public Authorities Protection Act* (56 & 57 *Vict. c.* 61), *s.* 1 (a).] On the 13th June, 1906, *G.* was injured by a collision with a tramcar in Belfast, and on the 30th July, 1906, he brought an action for damages for negligence against the defendants, who had taken over and were running the tramways in Belfast, under the provisions of 4 Edw. 7, c. ccxxix (Local and Personal). *G.* died on the 28th February, 1907, from the effect of the injuries, and, on the 11th April, 1907, his widow brought an action against the defendants on behalf of herself and her children, for damages for the death of her husband. The defendants pleaded that as Mrs. *G.*'s action had not been brought within six months from the alleged act of negligence, it was barred by the Public Authorities Protection Act, 1893: — *Held* (affirming the decision of the King's Bench Division), that, as the action was not brought within six months from the date of the accident, it was barred by section 1 of the Public Authorities Protection Act, 1893. *Held*, also, that the defendants, in working the tramways under 4 Edw. 7, c. ccxxix, were a Public Authority within the meaning of the Public Authorities Protection Act, 1893. *Gawley* v. *Corporation of Belfast* - - - - APP. 34

3.——*Railway Company—Defective fence—Turntable — Infant trespasser — Invitation to danger.*] The defendants, a Railway Company, maintained a siding and turn-table on a plot of ground adjacent to a public road which crossed their line by a bridge. The plot of ground was approached from the road by a gate, which was kept locked; and the road leading to the bridge was separated from defendants' premises by a clay bank and thorn hedge. There was a gap in this hedge large enough for a child to pass through, and a track, more or less defined, leading to the site of the turn-table. The plaintiff, a child of tender years, obtained access to the defendants' premises, as it was alleged, through this gap, in the company of two older boys, who placed him upon the defendants' turn-table, and then put the turn-table in motion to give him a ride, whereupon the plaintiff's leg was severely crushed. There was evidence that, on at least one former occasion, an employee of the defendants had seen boys playing

NEGLIGENCE—*continued.*
on the turn-table, who, on his approach, ran away. In an action by the plaintiff, claiming damages for injuries sustained by the alleged negligence of the defendants:—*Held*, by the Court of Appeal (Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.), reversing the decision of the majority of the King's Bench Division (Palles, C.B., and Johnson, J.; Kenny, J., dissenting), that the defective condition of the defendants' hedge was not the effective cause of the accident, and that, the plaintiff being a trespasser, and there being no evidence of invitation or allurement by the defendants, judgment should be entered for the defendants. *Cooke* v. *Midland Great Western Railway of Ireland Co.* K.B. 242; APP. 270 [REV.]
—— Fellow servant—Common employment 91
See REMITTING ACTION TO COUNTY COURT.
NOTICE — Eviction — Inhabited dwelling-house
See PENALTY. [468
NUISANCE — Dangerous structure adjoining public road—Form of action 393, 402
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OCCUPATION—Exclusive—41 & 42 Vict. c. 26, s. 5—Franchise - - 329, 622
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—— Under letting void at law - - 335
See PARLIAMENT. 4.
ORCHARD—Entry on land—Materials for repair of road—Contractor—Justices—Order
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ORDER—Justices—Lunatic Asylums Act 1875, s. 14—Certificate—Stamp - 15
See JUSTICES. 1.
—— Justices—Road contractor—Prescribing route—Time, - - - - - - 1
See JUSTICES. 2.
—— Justices—Signature - - - 285
See JUSTICES. 3.
ORDER AND DISPOSITION—*Hiring agreement — Household furniture — Custom — Reputed ownership.*] Articles of household furniture in the private residence of an individual at the date of his being adjudicated a bankrupt will be regarded as in the bankrupt's possession, order, or disposition; and the bankrupt will be regarded as the reputed owner of such articles, notwithstanding that he has obtained possession of them under an agreement of hiring and purchase on foot of which instalments remained unpaid at the date of the adjudication. *Ex parte Brooks* (23 Ch. D. 261) followed. *In re Waugh* - - - - - - APP. 612
ORDERS, GENERAL—1905 (22nd February), VIII., R. 3 - - - - - 98
See LOST WRIT.
—— XIV., R. 1 - - - - - - 56
See SPECIALLY INDORSED WRIT.
—— XVII., R. 4 - - - - - - 143
See ARBITRATION.
ORDERS, GENERAL—*continued.*
—— XXVIII., Rr. 2, 4, 5 - - - - 56
See SPECIALLY INDORSED WRIT.
—— XXXI., R. 12 - - - - 99, 100
See DISCOVERY. 3, 4.
—— 1898 (22nd January), Local Government Election, R. 17 - - - 433
See ELECTION.
—— 1898 (22nd December), Adaptation of Enactments, Art. III. - - - 160
See BARONIAL GUARANTEE.
—— 1898 (Aldermen, &c., Election), Sched. III. Articles 40, 41, 42 - - - 155
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—— 1898 (Urban District Councillors, &c., Election), Sched. III. Art. 42 - 158
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—— 1904 (Public Bodies), Articles, 66–69 160
See BARONIAL GUARANTEE.
—— ——, Articles 2 (f), 16, 44, 67, 69 - 176
See CRIMINAL INJURY.
PARLIAMENT — *Franchise — Aggregation of joint and separate ratings—Ten-pound-rated occupier*—13 & 14 *Vict. c.* 69, *s.* 110—31 & 32 *Vict. c.* 49, *s.* 6.] *J. B.* appeared on the list of rated occupiers for the Registration Unit of Loughash, Parliamentary Polling District of Dunamanagh, the rated value of the premises appearing as £10, and the townland where the premises were situated was given as Ballinamallaght. The claimant was rated for four separate and distinct ratings in the townland of Ballinamallaght, the aggregate of which amounted to £9 11*s.*; but the claimant was the owner of one-fifth share in a mountain adjacent to his farm, which was rated at £4 5*s.* The rate-collector proved that he collected the said rate of £4 5*s.* in different proportions from ten different parties, and that he had collected the sum of 17*s.*, being one-fifth, from the claimant; but the amounts so collected from the different parties were never segregated to the different names of the parties paying them on the rate-book, the rate appearing there as one rate of £4 5*s.*:—*Held*, that the claimant was not entitled to add the sum of 17*s.*, the one-fifth of the rating of the mountain, to his other ratings, so as to bring his entire rating up to £10. *Buchanan* v. *Torish* - - APP. 321
2. —— *Franchise — Inhabitant householder — Dwelling-house—Exclusive occupation* — 41 & 42 *Vict. c.* 26, *s.* 5.] The voter occupied the lower portion of a dwelling-house, including a bedroom, sitting-room, and kitchen, as a separate dwelling-house; the upper portion of the house was occupied by another person as a separate dwelling-house; but the person occupying the upper portion could not have access thereto except by means of the stairs leading from the kitchen occupied by the voter. The distance between the door opening into the kitchen at the end of the hall-passage

PARLIAMENT—*continued.*
to the bottom of the stairs was short, and evidence was given to show that it might be possible for any person to reach the bottom of the stairs without walking over the floor of the kitchen. The Revising Barrister found as a fact that the voter occupied the lower portion of the said dwelling-house, including the bedroom, sitting-room, and kitchen, as a separate dwelling-house; that the upper portion of the same house was occupied by another person as a separate dwelling-house; and that the person occupying the upper portion could not have access thereto except by means of the stairs which entered into the kitchen occupied by the voter. He also found as a fact that no person could reach the upper portion of the building without passing through the kitchen:—*Held*, by Lord O'Brien, L.C.J., and Holmes, L.J. (FitzGibbon, L.J., *dissentiente*), that the voter was not in exclusive occupation of the lower portion of the house, and was not entitled to the franchise. *M'Bride* v. *Bryans*, - - - - - - APP. 329

3. —— *Franchise — Inhabitant householder — Dwelling-house—Exclusive occupation—Burdensome easement*—41 & 42 *Vict. c.* 26, *s.* 5.] The voter, an inhabitant householder, had sublet one room on an upper story of the house, retaining in his own occupation the kitchen, a room beside the kitchen, and a front bedroom upstairs. It was necessary for the sub-tenant to pass through the kitchen in order to reach his room, or to reach the yard, where the only water-closet and sanitary convenience for the house were. The Revising Barrister found—(*a*) that the sub-tenant had, as against the voter, the right of passage through part of the qualifying premises, such right being necessary for the ordinary user of the premises sublet; (*b*) that the voter was in exclusive use of rooms other than the kitchen, and that such rooms did not by themselves constitute a dwelling-house; (*c*) that the voter's dwelling-house was made up of the rooms and the kitchen:—*Held*, that the case came within *M'Bride* v. *Bryans* (*ante*, p. 329), which the Court declined to re-open. *Coyle* v. *Mahon*; *Green* v. *Mahon* - APP. 622

4. —— *Franchise—Inhabitant occupier—Occupation under a letting void at law.*] The Court will not investigate questions of title in Registration cases where there is such occupation as would entitle the occupier to the franchise. *J. K.*, the father of the claimant, was tenant of a holding to which the Land Law (Ireland) Act applied, and on the holding there was a dwelling-house occupied by the said tenant until some time before the commencement of the statutory qualifying period on the 20th July, 1906, as the dwelling-house of the farm. Some time before the said date, *J. K.* let to his son, the claimant, a part of the said dwelling-house, and the claimant occupied the said part as

PARLIAMENT—*continued.*
tenant to his father during the qualifying period, the said dwelling-house being occupied by the father and son as two distinct and separate dwelling-houses. There was no other dwelling-house on the farm, and the claimant earned his living on the farm as a labourer to his father, and paid him weekly rent as tenant of that part of the dwelling-house in which the claimant lived. The landlord did not consent in writing to the sub-letting by the tenant to claimant:—*Held*, that the claimant was entitled to the franchise. *Glenn* v. *Brennan* (29 Ir. L. T. R. 79) commented on and explained. *Roulston* v. *Kerlin* - - APP. 335

PASSENGER — Public highway — Dangerous condition of adjoining house—Negligence —Personal injuries - - 393, 402
See NEGLIGENCE. 1.

PEACE OFFICER—*Local Government—Compensation for maiming—Appeal from County Court—Case stated by Judge of Assize—Form of question submitted—Inference of fact—Question of law.*] On the hearing of an appeal against a decree of a County Court Judge, awarding a constable compensation for maiming, under sect. 106 of 6 & 7 Wm. 4, c. 116, as amended by the Local Government (Adaptation of Irish Enactments) Order, 1899, the Judge of Assize held—(1) That, as a matter of fact, the applicant, who had been stoned by a riotous crowd, certain members of which he had previously brought to justice, was attacked by reason of his action on the occasion in question towards one of the crowd, whom he removed to his home on account of disorderly conduct; (2) that this man was not, in fact, arrested by the applicant; and (3) that in point of law the applicant was not, on the particular occasion, bringing a disturber of the public peace to justice; and he reversed the decree. The Judge, however, stated a case for the Court of Appeal, as to whether, "*on the evidence*," the applicant was entitled to compensation:—*Held*, by the Court of Appeal, that, on the form of the question submitted, the finding of the Judge of Assize could not be sustained; and that the applicant was entitled to compensation. *Cremin, Applicant; Lord Mayor, Aldermen and Burgesses of Cork, Defendants*, - - - APP. 61

PENALTY—11 & 12 *Vict. c.* 47, *s.* 2—*Eviction—Room in a dwelling-house situate in a town—Omission to give notice to relieving officer—"Inhabited dwelling-house or building used as a dwelling-house."*] Section 2 of 11 & 12 Vict. c. 47 applies to a single room held and occupied by a tenant in a dwelling-house situated in a town. *Guardians of the Abbeyleix Union* v. *De Vesci* - K.B. 468
—— Prosecution by School Attendance Committee —Application of fine - 375, 380
See FINE.

PERSONAL INJURIES—Negligence—Action for—Misconduct of fellow-servant—Remitting action - - - - - 91
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—— Negligence — Action for—Subsequent death of party injured—Lord Campbell's Act—Public Authorities Protection Act 34
See NEGLIGENCE. 2.

—— Passenger on public highway — Dangerous condition of adjoining house—Form of action - - - - - 393, 402
See NEGLIGENCE. 1.

—— Railway turn-table—Gap in fence—Infant trespasser - - - 242, 270
See NEGLIGENCE. 3.

PERVERSENESS — Jury—Inconsistent findings - - - - - 521, 581
See INCONSISTENT FINDINGS OF JURY.

PHOTOGRAPH—*Libel—Evidence — Lost document—Photograph of libellous letter — New trial directed after verdict for plaintiff — Verdict for defendant at second trial — New trial refused—Appeal from both orders.*] In an action for libel, contained in a letter alleged to have been written by the defendant, accusing the plaintiff of immorality with the wife of a third person, the defendant traversed writing the letter. The original letter was lost, but a photograph had been taken of it, and the envelope in which it was enclosed had been preserved. On the first day of the trial the plaintiff's counsel used the photograph in his speech to the jury, and the jury were allowed to see and examine it. The Court then adjourned. On the following day it transpired that the original letter was lost, and the Judge ruled that though the photograph was evidence of the contents of the letter, it could not be used for comparison of handwriting with the genuine letters of the defendant. The trial resulted in a verdict for the plaintiff, with £50 damages. The Divisional Court set aside the verdict, and directed a new trial. At the second trial the plaintiff's counsel did not offer the photograph in evidence, but they put in evidence, without objection, a "plain copy" of the libel, which did not show certain peculiarities appearing on the photograph, and relied upon the envelope, the evidence of two witnesses who had seen the letter before it was lost, and who were acquainted with the defendant's handwriting, and the use by the defendant of certain words and phrases in letters written by him, and proved to be genuine, similar to the words in the alleged libel. This trial resulted in a verdict for the defendant. The Divisional Court refused the plaintiff's motion to set aside the verdict, and for a new trial, and the plaintiff appealed from both orders of the Divisional Court:—*Held*, by the Court of Appeal—(1) that it was not competent for the plaintiff to appeal against the earlier order, as he had adopted and acted on it. *Held*, (2) by the

PHOTOGRAPH—*continued.*
Lord Chancellor and Holmes, L.J., that the verdict of the jury at the second trial must be considered by itself, and was not such a verdict that no reasonable jury could arrive at. *Held*, by Fitz Gibbon, L.J., that the second trial was a mis-trial, and the plaintiff was entitled to a new trial on payment of the costs of the second trial, of the new trial motion, and of the appeal. The use and admissibility of photographs as evidence of written documents considered. *M'Cullough* v. *Munn* APP. 194

PICKETING—Peaceful — Entry on premises—Trespass—By-law - - - 214
See BY-LAW.

POLLING STATIONS — Local Government Election - - - - - 433
See ELECTION.

POOR LAW — *Workmen's Compensation Act, 1906, s. 13 — Contract of service — Guardians—Medical officer.*] There is no contract of service between a dispensary doctor and the Poor Law Guardians of his district, within the meaning of the 13th section of the Workmen's Compensation Act, 1906, involving liability on the Guardians in the event of his accidental injury or death in the discharge of his duties. *Murphy, Applicant*; *Guardians of Enniscorthy Union, Respondents* - - - - - APP. 609

—— Infant—Registration of religion—Amendment - - - - - 343
See INFANT.

—— Notice of eviction — Inhabited dwelling-house—Town - - - - 468
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PORT—Custom of—Discharge of cargo - 482
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—— Vendor and purchaser—Tenancy created *de novo*—Delay in making title—Conditions
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PRACTICE—Amendment of writ of summons—Indorsement—Service—Motion for judgment - - - - - - 56
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—— Appeal—Acquiescence in previous order of Divisional Court directing new trial—Alleged mis-trial - - - 194
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—— Costs—Proceedings on behalf of the Crown 32
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—— County Court—Execution of decree—Liability of sub-sheriff for misconduct of bailiff - - - - - 138
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—— Cross-actions—Staying proceedings in second action - - - - - 629
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—— Remitting action to County Court—Negligence—No cause of action shown - 91
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—— Subpœna—Ballot paper and register - 155
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—— Trial—Verdict—Inconsistent findings 521, 581
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See AGENT.
—— Libel—Malice—Agent - - 483, 507
See LIBEL.
PRIVILEGE — Libel — Slander — Findings of jury - - - - - 521, 581
See INCONSISTENT FINDINGS OF JURY.
PROBATE—*Will—Mistake—Exclusion of words from probate—Correction of misdescription of legatee—Gift to "my mother."*] A testator, whose assets were very small, after giving some pecuniary legacies, left "rest to my mother—all furniture also to my mother." The will was drawn up in the testator's presence by his nephew *S.*, whose mother was the sister of the testator. The testator told *S.*, that he wished to leave his furniture and the rest of his property to your "mother," meaning his sister, *S.*'s mother. *S.* wrote the words above-mentioned in the will, to carry out the testator's
PROBATE—*continued.*
directions, but by mistake he inserted the word "my" before the word "mother." The Court made an order that the word "my" where it occurred before the word "mother" should be struck out of the will and not included in the probate, and, being of opinion that the word "mother" was intended to refer to the testator's sister, *S.*'s mother, and that she was, therefore, the residuary legatee, gave her liberty to apply for administration with the will annexed. *In the Goods of Wrenn* - - K.B. (PROB.) 370
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—— Compensation for criminal injuries — Estimates—Financial year - - 176
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RECEIPT—For two sums — Contemporaneous acknowledgment of payment of one 403
See STAMP.
RECEIVER — *Public service — Gratuity to employee—Judgment—Superannuation Act*, 1859.] A gratuity to a person who, having been an employee in the public service, has been constrained to retire from ill-health, awarded by Lords Commissioners of the Treasury, under section 6 of the Superannuation Act, 1859, is not attachable by

RECEIVER—*continued.*
process of law to answer a judgment recovered against such employee. *Timothy* v. *Day* [K. B. 26; APP. 30

2. —— *Public service—Superannuation allowance —22 Vict. c. 26 (Superannuation Act, 1859), ss. 10 and 11.*] The Court will not appoint a receiver by way of equitable execution over future instalments of a superannuation allowance, granted under section 10 of the Superannuation Act, 1859, to a public servant, if such servant is, at the time of the application to appoint a receiver, under the age of sixty years. *MacDonald* v. *O'Toole* [K. B. 386

REGISTER—Poor Law—Amendment—Religion of infant - - - - - - 343
See INFANT.

RELIEVING OFFICER—Notice to—Eviction
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RELIGION—Infant—Amendment of Poor Law Register - - - - - - 343
See INFANT.

REMITTING ACTION TO COUNTY COURT —*Practice—Cause of action not shown—Master and servant—Injury to servant—Action for negligence —Bad or defective system of work—Neglect to provide proper plant to prevent accidents—Duty of master—Delegation of such duty—Fellow-servant—Common employment.*] On an application to remit to the County Court an action brought under Lord Campbell's Act (9 & 10 Vict. c. 93) by the representatives of a deceased workman against his employer for negligence causing his death, it appeared that the employer had delegated to a competent person—a fellow-workman of the deceased—the duty of adopting a safe and proper system of work, and of providing materials for that purpose. It also appeared that it was by reason of the negligence, if any, of such fellow-workman in not adopting a safe and proper system of work that the deceased was killed:—*Held*, that the plaintiffs had not disclosed a cause of action against the defendant, and that the action should therefore be remitted to the County Court. *Carlos* v. *Congested Districts Board* - - - - - - K.B. 91

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—— Order for contractor's entry—Orchard 1, 285
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—— Stamp—Receipt—Two sums - - 403
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ROAD—*Liability of County Council to repair—Evidence of road being maintainable by county—Presentment for repairs by Grand Jury—Resolution for repair by County Council—Expenditure on roads —Authorized limits exceeded—Mandamus—Demand and refusal—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), ss. 4, 27, 82.*] The fact that a Grand Jury passed a presentment for the repair of a road, or that the County Council passed a resolution for, and expended money on, such repair, is not conclusive evidence that the road is a public road maintainable by the county. A mandamus will not be granted directing a County Council to expend money on the repair of a road where the effect would be to compel the expenditure on roads of a sum in excess of that permitted by section 27 of the Local Government (Ireland) Act, 1898. An application had been made on behalf of H. to a Rural District Council to repair, and keep in repair, a road, and to build a wall to protect it from the sea. H. subsequently obtained a conditional order for a mandamus, directing the County Council and the Rural District Council to put the road in repair, the claim to have the wall built being abandoned:—*Held*, that there had not been such a demand and refusal as would entitle H. to the mandamus sought for. *Held*, also, that the mandamus sought against the County Council should be refused on the ground that no proposal had been submitted, or application made, to them. *The King (Hewson)* v. *Wicklow County Council and Rathdown No. 2 Rural District Council* - - - K.B. 101

—— County Council contractor—Order for entry on land — Signature — Bias — Jurisdiction—Orcharding out - - 285
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—— County Council contractor—Order for entry on land — Time — Prescribing route—Orchard - - - - - - 1
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—— Dangerous structure adjoining — Injury to passenger - - - - 393, 402
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ROOM—Eviction—Notice of - - - 468
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RURAL DISTRICT COUNCIL—Repair of road - - - - - - 101
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SCHEME—Endowed Academy—Special meeting of Governors — Decorum — Dismissal of professor - - - - - 357
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SCHOOL ATTENDANCE COMMITTEE—Expenses—Prosecution — Fine — Portion applicable to relief of local rate 375, 380
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SEARCH WARRANT—Justices—Jurisdiction *See* JUSTICES. 4. [69

SEPARATION DEED — *Divorce* a mensâ et thoro—*Covenant not to sue for greater allowance—Subsequent adultery—Dissolution of marriage and decree for judicial separation—Power of Court—Jurisdiction.*] A deed of separation was executed between a husband and wife, by which it was provided that the wife should accept certain chattels and the sum of £100, and in which there was a covenant that she would not thereafter institute any proceedings to enforce any claim for any further alimony or support or maintenance. The husband subsequently committed adultery, and the wife obtained a decree for divorce *a mensâ et thoro*:—*Held*, that the subsequent adultery did not deprive him of the right to have the restraining provisions of the deed enforced. *Ross* v. *Ross* [K.B. (MAT.) 339

SERVICE—Amended writ of summons—Motion for judgment - - - - - 56
See SPECIALLY INDORSED WRIT.

—— Copy writ — Loss of original — *Ex parte* motion - - - - - - 98
See LOST WRIT.

—— Summons—Sale of Food and Drugs Act, s 6 —Constable—Petty Sessions Act, s. 12, sub-s. 2 - - - - - - 9
See JUSTICES. 6.

SERVICE, CONTRACT OF—Workmen's Compensation Act, 1906, s. 13. - 609
See POOR LAW.

SHERIFF—*County Court—Execution of decrees—Misconduct of sheriff's bailiff—Liability of sub-sheriff—Re-appointment—Time*—27 & 28 *Vict. c.* 99 (*Civil Bill Courts Procedure*), *s.* 5.] A civil-bill decree was lodged with a sub-sheriff for execution. The amount was paid by the debtor to the sheriff's bailiff, who appropriated it to his own use, and paid no part of it to the sheriff. More than six months after the succeeding high sheriff had been sworn into office, and the sub-sheriff was re-appointed by him, the execution creditor sued the sub-sheriff for the amount paid to the bailiff, and for a false return of *nulla bona* in respect thereof:—*Held*, that the sub-sheriff was protected by sect. 5 of 27 & 28 Vict. c. 99, and was not liable to be sued for the amount of the decree. *Riordan* v. *Irvine* - - - - - - - K.B. 138

SHIP—Custom of port—Discharge of cargo 482
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SLAUGHTER-HOUSE — Unsound meat — Possession - - - - - 234
See MEAT.

SPECIALLY INDORSED WRIT—*Amendment of writ without leave—Motion for judgment—R. S. C., I.* (1905, 22*nd February*), *Ord. III., R.* 6; *Ord. XIV., R.* 1; *Ord. XXVIII., Rr.* 2, 4, 5.] Where a plaintiff, by amendment under Order XXVIII., Rule 2, converts an ordinary into a specially indorsed writ, he cannot obtain final judgment upon the amended writ, under Order XIV., Rule 1, without service of the amended writ upon the defendant; nor can he obtain such judgment to the prejudice of the defendant's rights under Order XXVIII., Rules 4, 5. *Guinness* v. *Caraher* ([1900] 2 I. R. 505) followed. *Roberts* v. *Plant* ([1895] 1 Q.B. 597), considered. *Haigh* v. *Purcell* - - - - - - - APP. 56

STAMP—*Receipt—Stamped receipt for two sums—Contemporaneous unstamped receipt for one of such sums—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 101, 103.] The defendant gave *N.* a duly stamped receipt for a sum paid by *N.* for rent and goods supplied, and at the same time gave *N.* (for book-keeping purposes) a separate document purporting to be a receipt for the rent alone, which exceeded £2:—*Held*, that the latter document did not require a stamp. *Attorney-General* v. *Ross* [K.B. 403 [REV.]

—— Order of Justices under Lunatic Asylums Act, 1875, s. 14—Certificate - 15
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12 Vict. c. 16—Justice of the Peace, s. 2 69
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See FINE.
14 & 15 Vict. c. 93—Petty Sessions, s. 12, sub-s. (2) - - - - - 9
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40 & 41 Vict. c. 56—County Courts and Officers, s. 78 - - - - - - 214 *See* BY-LAW.
41 & 42 Vict. c. 26—Parliamentary and Municipal Elections, s. 5 - 329, 622 *See* PARLIAMENT. 2, 3.
41 & 42 Vict. c. 52—Public Health, ss. 132, 133 *See* MEAT. [234
45 & 46 Vict. c. 50—Municipal Corporations, s. 98, sub-s. (8) - - - 433 *See* ELECTION.
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STAYING PROCEEDINGS—*Cross-actions in respect of same occurrence—Staying second action before delivery of statement of claim—Remedy by counter-claim.*] Where cross-actions in tort had been brought by two persons against each other in respect of the same occurrence, and statements of claim had not been delivered in either action, the Court, on the motion of the plaintiff in the action which was prior in point of time, stayed the second action, leaving the plaintiff therein to his remedy by counter-claim in the first action. *Evans* v. *Keane*; *Keane* v. *Evans* - K.B. 629
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—— "Other reasonable expenses" — Lunatic Asylums Act, 1875, s. 14 - 15
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WORKMAN—*Accidental death of—Compensation — Dependency on workman's earnings at time of death — Widow — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.] On the hearing of a claim for compensation under the Workmen's Compensation Act, 1906, by the personal representative of a deceased workman who died as the result of an accident arising out of and in the course of his employment in respondent's service, it appeared that the deceased had maintained his wife until her removal as a dangerous lunatic to a lunatic asylum, where she was detained under confinement, and where she was being maintained by the asylum authorities at the date of her husband's death:—*Held*, by the Court of Appeal, affirming the decision of the County Court Judge, that these circumstances were insufficient to rebut the presumption of dependency, and that there was a total dependency of the wife on her husband's earnings. *Kelly, Applicant; Hopkins, Respondent.* [APP. 84

—— Poor Law Guardians — Medical officer — Contract of service - - - 609
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